Supreme Court, U.S.
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No. 95-1642

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In The

Supreme Court of the United States

October Term, 1995

FERNANDO GOMEZ, M.D.,

Petitioner,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER; BERNARD SIGEL, M.D.; HOWARD ZAREN, M.D.; PASCHAL M. SPAGNA, M.D.; STEVEN G. MEISTER, M.D.; GLEN WHITMAN, M.D.; LESLIE A. MILLER, ESQUIRE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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B. WHETHER THE THIRD CIRCUIT'S DECISION THAT THE PROBATIVE VALUE OF EVIDENCE OF DISCRIMINATION IS DIMINISHED WHEN SOME MEMBERS OF THE PROTECTED GROUP RECEIVE FAVORABLE TREATMENT IS IMPROPER AND CONFLICTS WITH THIS COURT'S DECISIONS IN *O'CONNOR V. CONSOLIDATED COIN CATERERS CORPORATION* AND *PRICE WATERHOUSE V. HOPKINS*?

II. WHETHER THIS COURT SHOULD RESOLVE A CONTINUING CONFLICT BETWEEN THE CIRCUITS CONCERNING WHETHER AN OFFICIAL MUST POSSESS THE AUTHORITY TO HIRE AND FIRE, OR FORMAL DECISION-MAKING AUTHORITY, FOR HIS ACTIONS TO SUPPORT AN INFERENCE OF DISCRIMINATION UNDER TITLE VII?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, FERNANDO GOMEZ, M.D., respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on November 15, 1995, affirming the District Court's order of August 12, 1994 granting respondent's motion for judgment as a matter of law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 71 F.3d 1079 (3rd Cir. 1995) and is reprinted at pages App. 1-17 of the appendix. The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported and is reprinted at pages App. 24-50 of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1995. A timely petition for rehearing was denied on January 12, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions involved in this case are as follows:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., which provides, in pertinent part:

> It is unlawful to fail or to refuse to hire or to discharge any individual [ ] because of race, color, religion, sex or national origin.

2. Federal Rule of Civil Procedure 50(a), *Judgment as a Matter of Law*, which provides, in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that

> party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

3. Fifth Amendment, U.S. Constitution, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This national origin discrimination case was filed on August 12, 1992 in the United States District Court for the Eastern District of Pennsylvania seeking relief under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §951 et seq. The district court dismissed the action against all defendants except the Medical College of Pennsylvania ("MCP") before the case was submitted to the jury. On May 26, 1994, following a six-day trial, a unanimous jury returned a verdict in petitioner's favor and awarded damages in the amount of $2.484 Million.[1] Also on May 26, 1994, the district court granted respondent's motion to strike petitioner's claim for punitive damages under the PHRA. On August 12, 1994, following the timely filing of respondent's post-trial motions, the district court entered an order vacating the judgment for petitioner and entering judgment as a matter of law in favor of respondent, denying as moot respondent's motions for a new trial and for reduction of damages or a new trial on damages. Petitioner timely appealed the district court's order to the United States Court

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[1] The award represented plaintiff's wage and benefits losses, plus $248,000 for mental anguish and humiliation. The district court dismissed petitioner's claim for punitive damages before the case was submitted to the jury.

of Appeals for the Third Circuit.[2] On November 15, 1995, the Third Circuit affirmed the decision of the district court granting judgment as a matter of law for respondent without addressing petitioner's appeal of the order striking his claim for punitive damages. A timely petition for rehearing was denied on January 12, 1996.

FACTUAL BACKGROUND

Petitioner, Dr. Fernando Gomez, is a sixty-five (65) year old native of Colombia. A board certified cardiothoracic, vascular and general surgeon, petitioner was recruited by the Medical College of Pennsylvania ("MCP") for a position as a staff surgeon in its Division of Cardiothoracic Surgery. At the time of his recruitment, Dr. Gomez had been a cardiothoracic surgeon for more than twenty (20) years and had spent the previous twelve (12) years at Deborah Heart and Lung Center ("Deborah"), located in Browns Mills, NJ, where he served as Chief of Vascular Surgery, Director of the Surgical Intensive Care Unit, and a member of the cardiothoracic surgery service. Dr. Gerald Lemole, Chief of Cardiovascular Surgery at Deborah, described Dr. Gomez as "an extremely competent and capable cardiothoracic surgeon with great dedication and commitment to his patients" who was "well-liked" by the nurses and physicians there.

At MCP, Dr. Steven Meister, Chief of Cardiology, was the "main referrer" of cardiac patients for surgery. Dr. Meister first met Dr. Gomez when interviewing him as part of MCP's recruitment effort. Meister then wrote to Dr. Paschal Spagna, Chief of Cardiothoracic Surgery, and reported the results of

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[2] The Equal Employment Opportunity Commission ("EEOC") participated in petitioner's initial appeal to the Third Circuit, and his Petition for Rehearing, urging the court to reinstate the jury verdict for petition. In its submissions, the EEOC argued that the Third Circuit committed legal error in its evaluation of petitioner's evidence of bias, and that "[i]f left standing, several of the [court]'s rulings could have a substantial, negative impact on the enforcement of Title VII."

the interview and Meister's assessment of petitioner's candidacy. Dr. Meister stated:

> One final area of concern for me is his "presentability". He is a foreigner and both speaks and looks it. I will admit that my initial very negative feelings on this point did improve a bit as I sat and spoke with him. Nevertheless, I have some concerns that he may not be the guy who should walk into a patient's room first and discuss an operation, nor am I entirely comfortable that he is the man to be communicating with referring doctors after the surgery.

Dr. Meister favored Dr. Haji Shariff for the position because even though "[he] is also a foreigner, [he] speaks and acts very American. In this respect he is very much ahead of Gomez."

Petitioner was hired despite Dr. Meister's preference for someone more "American" and was employed by MCP for more than two years. Although Dr. Howard Zaren, Chairman of Surgery, testified that Dr. Meister was responsible for making patient referrals to Dr. Gomez, from the outset of petitioner's employment, Dr. Meister refused to refer any patients to him. Ultimately, Dr. Gomez was discharged by MCP because he was not receiving sufficient patient referrals.

REASONS FOR GRANTING THE WRIT

I. A. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS CONCERNING WHETHER A PLAINTIFF MUST DEMONSTRATE THAT DISCRIMINATION WAS BASED UPON HIS SPECIFIC COUNTRY OF ORIGIN TO SUPPORT A TITLE VII CLAIM OF NATIONAL ORIGIN DISCRIMINATION; AND

B. DETERMINE THAT THE THIRD CIRCUIT'S DECISION THAT THE PROBATIVE VALUE OF EVIDENCE OF DISCRIMINATION IS DIMINISHED WHEN SOME MEMBERS OF THE PROTECTED GROUP RECEIVE FAVORABLE TREATMENT IS IMPROPER AND CONFLICTS WITH THIS COURT'S DECISIONS IN *O'CONNOR V. CONSOLIDATED COIN CATERERS CORPORATION* AND *PRICE WATERHOUSE V. HOPKINS?*

The Third Circuit ruled that the record did not support petitioner's claim of national origin discrimination because Dr. Meister referred to Dr. Gomez only as a "foreigner" as opposed to "a native of Colombia." 71 F.3d at 1085. The court's decision conflicts with the decisions of other circuit courts which have not required this degree of specificity for liability to attach.[3] Additionally, the court discounted the probative value of Dr. Meister's bias against petitioner because of his favorable treatment of other foreign-born surgeons at MCP. This conflicts with this Court's decisions in *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___ (April 1, 1996), and *Price Waterhouse v. Hopkins*, 490 U.S.

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[3] Although the Third Circuit stated that "the record does not support any inference that [Dr. Meister] was biased because plaintiff was a native of Colombia," 71 F.3d at 1085, the record shows that Dr. Meister had read petitioner's curriculum vitae which clearly states that Dr. Gomez was born in Colombia. Therefore, even under the improperly narrow standard established by the Third Circuit, petitioner advanced sufficient evidence to demonstrate national origin discrimination. As more fully set forth in Section IV *infra*, this is one of many instances in which the court overlooked critical parts of the record in arriving at its decision.

228 (1989), that discrimination can occur even where some members of the protected group receive favorable treatment.

A. The Third Circuit's Specificity Requirement Conflicts with the Decisions of Other Circuit Courts and Imposes Too High a Burden of Proof Upon Plaintiffs in National Origin Discrimination Cases.

The plain language of Title VII does not prescribe whether a specific country of origin must be identified to support a claim of national origin discrimination, only that adverse decisions based upon country of origin violate the Act. Although the legislative history provides little guidance, Congress drew no distinction between those employees the statute was intended to protect. The Equal Employment Opportunity Commission ("EEOC") has defined national origin discrimination to include adverse employment decisions "because an individual has the physical, cultural, or linguistic characteristics of a national origin group." 29 C.F.R. §1606.1 (1995). This regulation has been interpreted to mean that Title VII is violated "if the employer is motivated by a general xenophobic prejudice against anyone who seems 'foreign'." 3 A. Larson & L. Larson, *Employment Discrimination* §58.03 at 58-7 (1995), citing 29 C.F.R. §1606.1. Other circuit courts have recognized that an employer engages in unlawful national origin discrimination when employment decisions are grounded upon a person's general foreign characteristics.[4]

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[4] *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993), citing *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (Title VII violated when decision based upon "foreign accent" where performance not affected); *Carino v. University of Oklahoma Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) ("A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position [ ] is not a legitimate justification for adverse employment decisions."); *Berke v. Ohio Dep't of Public Welfare*, 628 F.2d 981 (6th Cir. 1980) (per curiam); *Johnson v. Fleet Mortgage Corp.*, 878 F.Supp. 71, 75 (E.D.La. 1995) (plaintiff of "non-caucasian features" and uncertain of her

The Third Circuit's specificity requirement is irrational. It is illogical to permit an American to discriminate against a "foreigner" because the employer does not know where the employee was born, where the intent to discriminate is equally apparent because the employee is not "American." Similarly, in the context of a claim of race discrimination, it should not matter whether a white discriminates against a black because he is black, or because he is not white. The question is whether the adverse employment action was because of national origin. If so, then Title VII is violated.

If allowed to stand, the Third Circuit's decision will have a far-reaching, negative effect on the enforcement of nearly all employment discrimination statutes. For example, in claims brought pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., disabled persons would carry the heavy burden of demonstrating discrimination based upon a specific disability, and not merely against persons in wheelchairs. In claims of discrimination based upon religious belief, plaintiffs would have to show bias against a specific religion, and not merely against persons who wear a cross. The Third Circuit's ruling also permits biased individuals who mistakenly identify a person's national origin, disability, or other specific basis for protection, to escape liability altogether. For example, while persons from China and Korea may have certain traits in common, each still has a different national origin. Under the Third Circuit's ruling, discriminatory treatment of the Korean based upon the mistaken belief that he was from China would not be actionable. It could not have been the intent of Congress to impose liability only when those harboring bias have sufficiently keen geo-national knowledge to identify a person's specific country of origin.

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national origin); *Metoyer v. State of Kansas, et al.*, 874 F.Supp. 1198 (D.Kan. 1995) (" 'membership" requirement [ ] must not be taken too literally in cases where a plaintiff's connection to a national group is in dispute"); *Yacoub v. McGovern*, 840 F.Supp. 947, 956 (S.D.N.Y. 1993) (plaintiff of "Middle Eastern [ ] or non-European-American national origin").

B. The Third Circuit's Decision That The Probative Value of Discriminatory Bias is Diminished Where Some Members of the Protected Group Receive Favorable Treatment is Contrary to the Decisions of This Court.

While the jury found that Dr. Meister's negative comments about petitioner's "presentability" stemmed from an anti-foreign bias, the Third Circuit suggested that any inference of discrimination was abated when Meister "praised another 'foreigner', Dr. Haji Shariff, who was of Indian or Pakistani extraction." 71 F.3d at 1085. In *O'Connor,* this Court recently addressed a similar issue in the context of a case brought pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq. In writing for a unanimous Court, Justice Scalia stated:

> [The statute] does not ban discrimination against persons because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.*

Slip op. at 4 (emphasis in original). This analysis is equally applicable to petitioner's case. Dr. Meister preferred Dr. Shariff precisely because he "speaks and acts very American" and because "in this respect," (i.e. "presentability" as an "American"), Shariff was "very much ahead of Gomez." 71 F.3d at 1081. The jury correctly found that Meister's preference for Shariff because of his "American" characteristics did not negate Meister's anti-foreign bias against Gomez.

In *Price Waterhouse,* a female employee of an accounting firm brought an action alleging that she had been denied partnership based upon her sex. There was evidence that the employer had engaged in sex-based stereotyping when it characterized Hopkins as "macho", contended that she "overcompensated for being a woman," and suggested among other things that she should "walk more femininely, talk more

femininely, [and] dress more femininely." 490 U.S. at 235. Although the employer contended that this did not amount to discrimination, the Court disagreed stating that "we are beyond the day when an employer [can] evaluate employees by [ ] the stereotype associated with [a protected] group." *Id.* at 251. The Court stressed that Title VII was designed to lift employees out of the "bind" of having to choose between acting in conformity with a stereotype or losing out on an employment opportunity. *Id.*

As *O'Connor* and *Price Waterhouse* make clear, an employer can violate Title VII without disfavoring all members of a protected group. In *Price Waterhouse,* the firm apparently was willing to advance a certain "type" of woman, i.e., one who acts "femininely," just as Dr. Meister was willing to support a certain "type" of foreigner, i.e., one who speaks and acts "American." The question is whether the employer has allowed an impermissible factor to influence the outcome of the decision. If so, then Title VII is violated. The petition should be granted to address this aspect of the Third Circuit's decision.

II. THIS COURT SHOULD RESOLVE A CONTINUING CONFLICT BETWEEN THE CIRCUITS CONCERNING WHETHER AN OFFICIAL MUST POSSESS THE AUTHORITY TO HIRE AND FIRE, OR FORMAL DECISION-MAKING AUTHORITY, FOR HIS ACTIONS TO SUPPORT AN INFERENCE OF DISCRIMINATION UNDER TITLE VII.

Although the jury found a close causal connection between Dr. Meister's refusal to make patient referrals to petitioner and the discharge decision, the Third Circuit discounted the probative value of Dr. Meister's discriminatory animus because he was "outside the chain of decision-makers who had the authority to hire and fire plaintiff." 71 F.3d at 1085. This Court has not yet decided whether an official must possess formal decision-making authority for his actions to support an inference of discrimination, but numerous circuit

courts addressing the issue have imposed no such requirement.[5] These courts acknowledge that an employment action can be discriminatory, even if taken for neutral reasons, where the action would not have been taken but for previous acts of discrimination. The panel's refusal to acknowledge the full probative value of Dr. Meister's bias also conflicts with other decisions of the Third Circuit that it is enough if an individual has "influence[d] the decision-making process" and "infecte[d] the ultimate decision." *Roebuck v. Drexel Univ.*, 852 F.2d 715, 727 (3d Cir. 1988), *accord Wilson v. Susquehanna Township Police Dep't*, 55 F.3d 126 (3d Cir. 1995) (manager's bias supported an inference of discrimination even though he did not "technically" make the decision where the manager "took an active part in personnel matters and expressed his discriminatory views").[6]

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[5] *See Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1494 (9th Cir. 1995) (proper inquiry is not whether supervisor had "formal authority to decide whether [plaintiff] obtained a transfer, [but whether] she had the practical power to do so."); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994) ("an employer cannot escape responsibility for [ ] discrimination . . . when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of [women].") (citation omitted); *Simpson v. Diversitech General, Inc.*, 945 F.2d 156, 160 (6th Cir.), *cert. denied*, 112 S.Ct. 1072 (1991) (proper inquiry is whether plaintiff terminated based upon supervisor's race-based actions, not whether supervisor made final decision to terminate); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("If [the ultimate decisionmakers] acted as the conduit of [the supervisor's] prejudice – his cat's paw – [their innocence] would not spare the company from liability"); *Vaughn v. Edel*, 918 F.2d 517, 523 (5th Cir. 1990) (defendant cannot "sterilize a seemingly objective decision to fire an employee when earlier discriminatory motives have infected it").

[6] *See Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) ("discriminatory comments by non decision-makers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination"); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 639 (3d Cir. 1993) (not necessary to assign factual bias to ultimate decisionmaker where individuals harboring bias "exercised influence over the dismissal process"). *See also EEOC v. Manville Sales*

The Third Circuit's ruling improperly insulates employers from legal responsibility for the discriminatory conduct of their supervisors, managers and others merely because they acted against persons outside of their immediate supervision, or their specific department, division, or unit. This eliminates the protections of the statute for many employees who, like petitioner, have their jobs adversely affected by discriminatory bias. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (bias of supervisor who "set up" plaintiff by assigning him an unpromising territory, then portrayed plaintiff in "worst possible light" to ultimate decisionmakers, sufficient to support discriminatory discharge claim).

The court also held that Dr. Meister's statements fell into "the category of stray remarks by non-decision makers which are inadequate to support an inference of discrimination by the employer." 71 F.3d at 1085 (citations omitted). Dr. Meister's remarks were not stray, but were made in specific reference to petitioner concerning an important aspect of employment decision-making: patient referrals. Dr. Meister's letter to Dr. Spagna was consistent in time with his decision, made at the outset of petitioner's employment, to refuse to refer patients to Dr. Gomez. Since Dr. Meister refused to make patient referrals to Dr. Gomez throughout petitioner's employment at MCP, his subsequent complaints to Dr. Spagna and Dean Ross, which included the suggestion that petitioner not speak to patients "at least while they [were] conscious," were equally probative.[7] Ultimately, petitioner was

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Corp., 27 F.3d 1089, 1094 (5th Cir. 1994) (not necessary that bias be directly tied to individual who "formally make[s] the final decision"); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-598 (1st Cir. 1987) (official was sufficiently connected to decisional process where involved in incidents that led to ultimate decision).

[7] At trial, Dr. Meister testified that petitioner "came across as not being very comfortable [ ] in our culture" and that "Dr. Gomez looked a little odd." He attributed his negative impression of petitioner "to the isolation that [he] thought [ ] a person might have been subject to being as

discharged because he had received few patient referrals, which as Dr. Zaren testified, was directly attributable to Dr. Meister.

The Third Circuit's characterization of Dr. Meister's statements as "stray remarks," when the jury found that these statements evidenced a discriminatory bias, also conflicts with the decisions of the Second, Seventh, Eighth, and Eleventh Circuits, as well as other decisions of the Third Circuit, that discriminatory statements made outside the context of an employment decision can support a finding of discrimination.[8]

The Third Circuit's decision will substantially and improperly limit the ability of employees to press legitimate claims of intentional discrimination. The focus has never been

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poorly fluent in our language as Dr. Gomez" and as isolat[ed]" from "our culture in general."

[8] *See Futrel v. J.I. Case*, 38 F.3d 342, 347 (7th Cir. 1994) (official's discriminatory statements could support a finding that the plaintiff " 'carried [his] ultimate burden of persuasion' " even though the statements were note made "within the context of the employment decision in question"); *Hook v. Ernst & Young*, 28 F.3d 366, 374 (3rd Cir. 1994) (sufficient if " 'a person involved in the decision-making process' " has made statements " 'that reflect a discriminatory or retaliatory animus of the type complained of in the suit' "), quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181-82 (2nd Cir. 1992); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993) (evidence that manager had used racial epithets in making other employment decisions with respect to the plaintiff supported finding that his decision in the case at hand was racially motivated); *Kirschner v. Office of the Comptroller of New York*, 973 F.2d 88, 93 (2nd Cir. 1992) (discriminatory remarks that are not made in reference to specific employment decision can still support a finding of discrimination); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) (official's disparaging remarks about the employment of older workers provided direct evidence that later decision to terminate the plaintiff was discriminatory); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923-34 & n.6 (11th Cir. 1990) (manager's statement that "he wouldn't hire any black people" if it were his company provided direct evidence that a discriminatory motive entered into his later decision to oppose the promotion of a black employee).

upon a person's technical decision-making power. Rather, the test is whether the evidence of bias is sufficiently tied to the decisional process to raise an inference of discrimination. If allowed to stand, a consequence of this ruling would be to permit employers of even modest sophistication to successfully insulate themselves from liability for a variety of discriminatory employment actions merely by ensuring that final decisions are made by the company's personnel or human resources department, and not someone in the employee's direct line of supervision. Such a practice completely undermines the protections of the statute and should be prohibited. The petition should be granted to resolve the conflicts created by the Third Circuit's decision and to correct this aspect of the court's opinion.

III. THIS COURT SHOULD DECIDE WHETHER THE THIRD CIRCUIT'S DECISION TO GIVE SPECIAL CONSIDERATION TO DOCTORS EXERCISING PROFESSIONAL JUDGMENT, AND THE MEDICAL INSTITUTIONS EMPLOYING THEM, IS CONTRARY TO THE PLAIN LANGUAGE OF TITLE VII AND TO THE INTENT OF CONGRESS TO EXTEND TITLE VII PROTECTIONS EQUALLY TO ALL EMPLOYEES.

The Third Circuit held that in discrimination cases brought against medical institutions, special consideration must be given to the defendant's evidence because of the "importance to society" of the hospital's work.

> What is established is that the cardiologists, in their professional judgments, did not want to send their patients to plaintiff. Those actions are sufficient to defeat the plaintiff's position whether or not the cardiologists were objectively correct. The proper exercise of medical judgment in the best interests of patients is of critical importance to society, and courts must not overlook that consideration in arriving at a proper resolution in disputes such as this.

71 F.3d at 1085. Authority for this deference to "professional judgment" cannot be found in the plain language of Title VII and is contrary to the intent of Congress to provide employees with a discrimination-free workplace regardless of the type of work performed by the employer. The Third Circuit's decision substantially narrows the protections accorded under Title VII not just for employees of hospitals, but for those individuals whose employer's work is deemed to be of sufficient "importance to society" to merit special consideration.

This Court has consistently held that the purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [American-born] employees over other employees." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). Congress has indicated that it considers the policy against workplace discrimination to be "of the highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (citations omitted). While this Court has not addressed whether the purported importance of an employer's work may be taken into consideration in determining whether Title VII has been violated, Congress specifically rejected such a status-based application of the Act.

In 1972, Congress considered Proposed Amendment No. 858 which would have exempted employers of doctors from compliance with the provisions of Title VII. *See* 118 Cong. Rec. 3395-96 (1972). Opponents recognized that the proposed amendment would undermine the very purpose behind the 1964 Act and would mean "stepping back 100 years [from the] dictates of the Constitution and the basic law of discrimination." *Id.* at 3798, 3800.

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only blue collar jobs and ditchdigging jobs are reserved for them; . . . Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion

> – just confined to physicians or surgeons, . . . and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

Id. at 3802 (Statement of Senator Jacob Javitz); *see also United States v. Medical Society of S.C.*, 298 F.Supp. 145, 155-156 (D.S.C. 1969) (hospitals not exempt from Title VII). As Senator Javitz made clear, such an amendment would have rendered the application of Title VII class-based when the purpose of the statute is to provide equal opportunity. As this Court has noted, "When Congress wanted to grant an employer complete immunity [from the provisions of Title VII], it expressly did so." *Hishon v. King & Spalding*, 104 S.Ct. 2228, 2235, n. 11 (1984), citing 42 U.S.C. §§2000e(b)(1), (2) (exempting Indian tribes and small businesses).

Although Congress refused to exempt medical institutions from the provisions of Title VII, the Third Circuit effectively has done so by according greater weight to the evidence of doctors purportedly exercising "medical judgment" than to that of the victims of discrimination. In the judgment of the court, the unfettered exercise of professional judgment simply outweighs the right to equal treatment.[9] As the EEOC stated in its amicus brief, "Medical institutions should not be permitted – under the mantra of 'medical judgment' – to insulate their allegedly discriminatory conduct from the type of exacting scrutiny demanded by a fair application of the legal standards that govern pretext claims." *Brief of the Equal Employment Opportunity Commission as Amicus*

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[9] Although both sides offered testimony from doctors, the Third Circuit gave special consideration only to those physicians testifying on behalf of MCP. Therefore, not only was the deference to "professional judgment" itself improper, the court failed to grant it to both parties.

Curiae in Support of the Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc at 14-15.[10]

The Third Circuit's decision has important, broad-based, negative consequences concerning the enforcement of Title VII. If allowed to stand, the decision will significantly narrow, and in some cases eliminate altogether, the protections accorded to employees of hospitals, and by extension, to many others whose employer's work is deemed to be sufficiently "important to society" to warrant special consideration.[11] The petition should be granted so that the clear intent of Congress to treat all employees equally, regardless of the status of the employer, can be effectuated.

IV. THIS COURT SHOULD RESOLVE A CONTINUING CONFLICT BETWEEN THE CIRCUITS AND THIS COURT CONCERNING THE PORTIONS OF THE RECORD TO BE CONSIDERED IN ANALYZING A MOTION FOR JUDGMENT AS A MATTER OF LAW.

In its review of the district court's decision, the Third Circuit focused its discussion on the evidence advanced by the moving party, which it viewed in respondent's favor, and disregarded much of the evidence supportive of the jury's

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[10] The EEOC submitted two briefs advising the panel that it failed to apply the proper legal standards in the evaluation of petitioner's evidence of discriminatory bias, and exhorted the court to reinstate the jury's verdict. The panel's failure to defer to the Commission's reasonable construction of Title VII is contrary to the "fundamental principle" of law requiring judicial deference to a reasonable statutory interpretation by an administering agency. *Estate of Cowhart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992).

[11] This deference could reasonably be extended even further by the courts to include employers with whom the public's safety is entrusted, such as public carriers and police and fire departments, as well as those others upon whose services the public depends, such as the postal service, courts, and other government agencies.

verdict. This is an extreme departure from the Rule 50 analysis employed by this Court and raises the broad question of what evidence a court should consider in determining whether sufficient evidence exists to support a jury's verdict. Although circuit courts have disagreed over what portions of the record should be considered when reviewing a judgment pursuant to Rule 50, the Third Circuit's approach has been implicitly rejected by this Court and by each of the other circuit courts. The petition should be granted because the Third Circuit's opinion is in conflict with the decisions of these Courts, "[b]ecause the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v.," *Schwimmer, DBA Supersonic Electronics Co. v. Sony Corporation of America*, 459 U.S. 1007 (1982) (Dissent of Justice White from denial of petition for writ of certiorari), and because petitioner's case was wrongly decided.

A. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER WHAT PORTIONS OF THE RECORD TO CONSIDER.

There has been some controversy concerning what evidence the court is required to consider, and that which it may consider, under a proper Rule 50 analysis. This Court has stated:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom [the motion has been filed].

Wilkerson v. McCarthy, 69 S.Ct. 413, 415 (1949), *accord Webb v. Illinois Central Railroad Co.*, 77 S.Ct. 451, 453 (1957). Circuit courts agree that the record must be viewed in the light most favorable to the party opposing the motion,[12]

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[12] *See Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546 (1st Cir. 1994); *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033 (2nd Cir.

but disagree over which portions of the record should be considered.[13] Wright & Miller state, "The correct rule seems to be that the district court may consider all of the evidence favorable to the position of the party opposing the motion for judgment as a matter of law as well as any unfavorable evidence that the jury is required to believe." *See* 9a C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* §2529 at 299 (1994).[14] However, the Third Circuit focused its discussion of the facts on the unfavorable testimony of MCP's cardiologists and Dean, an approach which necessarily resulted in the granting of respondent's motion and rendered petitioner's jury verdict meaningless.[15]

1992); *Rotondo v. Keene Corp.*, 956 F.2d 436 (3rd Cir. 1992); *Persinger v. Norfolk and Western Ry. Co.*, 920 F.2d 1185 (4th Cir. 1990); *Texas Farm Bureau v. U.S.*, 53 F.3d 120 (5th Cir. 1995); *Monette v. AM-7-7 Baking Co., Ltd.*, 929 F.2d 276 (6th Cir. 1991); *Thomas v. Stalter*, 20 F.3d 298 (7th Cir. 1994); *Abbott v. City of Crocker, MO*, 30 F.3d 994 (8th Cir. 1994); *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993), cert. denied, 114 S.Ct. 2163 (1994); *Peterson v. Hager*, 714 F.2d 1035 (10th Cir. 1984); *Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993); *Wang Laboratories, Inc. v. Toshiba Corp.*, 993 F.2d 858 (Fed. Cir. 1993); *Carter v. Duncan*, 727 F.2d 1225 (D.C. Cir. 1984).

[13] While some circuit courts have held that the entire record should be considered, *see Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261 (5th Cir. 1994), citing *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc); *Ortega v. Schramm*, 922 F.2d 684 (11th Cir. 1991); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325 (7th Cir. 1989); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966 (2nd Cir. 1987); *Robinson v. Cupples Container Co.*, 513 F.2d 1274 (9th Cir. 1975), others have considered evidence of the non-moving party only, *see Douglas v. Eaton Corp.*, 956 F.2d 1339 (6th Cir. 1992); *Dace v. ACF Industries*, 722 F.2d 374 (8th Cir. 1983), aff'd, per curiam, 728 F.2d 976 (1984); *Silkwood v. Kerr-McGee*, 769 F.2d 1451 (10th Cir. 1985), cert. denied, 476 U.S. 1104 (1985); *Kingston v. McGrath*, 232 F.2d 495 (9th Cir. 1956).

[14] *See also Santiago-Negron v. Castro-Davila*, 865 F.2d 431 (1st Cir. 1989).

[15] The Third Circuit has been inconsistent in its analysis of Rule 50. *See Parkway Garage Inc. v. City of Philadelphia*, 5 F.3d 685 (3rd Cir. 1993) (considering evidence of the non-moving party), but see *Inventive*

1. The record viewed in the light most favorable to petitioner supported the jury's verdict.

Had the Third Circuit considered only the evidence favorable to petitioner, or the entire record but in the light most favorable to petitioner, or all of the evidence favorable to petitioner as well as any unfavorable evidence that the jury was required to believe, the court would have found that:

a) Petitioner was born in Colombia, as were his antecedents, and that his race is Colombian. App. at 106a;[16]

b) At the time that petitioner was recruited by MCP, he had 20 years of experience as a cardiothoracic surgeon, and as discussed *supra*, had spent the previous 12 years working in high-level positions at Deborah Heart and Lung Center, one of the busiest cardiac care facilities in the area. App. at 17a-24a;

c) Dr. Meister was responsible for making patient referrals to petitioner for surgery. App. at 461a;

d) Dr. Meister harbored an acute national origin bias against petitioner. App. at 15a-16a, 86a-88a, 158a, 319a-322a, 330a-332a, 333a-335a, 438a-439a, 491a-496a;

e) Although petitioner worked at MCP for more than two years, he did not receive *a single patient referral* from Dr. Meister or any of the staff cardiologists, all of whom regularly made individual patient referrals to the remaining cardiothoracic surgeons during that same time period. App. at 102a-103a, 143a, 147a-148a, 150a-151a,

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Music Ltd. v. Cohen, 617 F.2d 29 (3rd Cir. 1980) (considering evidence of the non-moving party plus uncontradicted, unimpeached evidence of disinterested third parties).

[16] This section contains citations to the appendix filed with petitioner's submissions to the Third Circuit.

153a-154a, 356a-357a, 398a-399a, 552a, 565a, 581a;

f) Dr. Meister's refusal to refer patients to petitioner was inconsistent with MCP's policy and practice of making patient referrals to its staff surgeons in the first instance and then to non-staff surgeons, as well as with Meister's own practice of referring cases to surgeons who were new to the hospital to determine their skill level. App. at 354a, 357a-358a, 461a;

g) Petitioner was discharged by MCP because he had received so few patient referrals. App. at 41a; and

h) Dr. Glenn Whitman, an American-born caucasian, was hired after petitioner and also held the position of associate professor of cardiothoracic surgery. Dr. Whitman, who had only two (2) years of experience as a cardiothoracic surgeon at the time he was hired by MCP, received patient referrals from the outset of his employment, and received more than 100 patient referrals from MCP's Division of Cardiology in his first ten months of employment, including referrals from Dr. Meister who sent him "as many cases as [he] could." App. at 357a, 398a.

Although evidence of the disparate treatment between petitioner and Dr. Whitman was enough to support the jury's verdict, petitioner advanced substantial evidence of Dr. Meister's bias against him and his influence in the decisonal process. *See* Part I *supra;* n. 7 *supra.*

2. The Court Improperly Engaged in Credibility Determinations and Ignored Conflicts in the Evidence.

In its discussion of the facts, the Third Circuit repeatedly determined the testimony of MCP's cardiologists to be true while refusing to acknowledge petitioner's proofs or conflicts in the evidence. Although the panel partially enunciated the

proper standard of review, 71 F.3d at 1083, it subsequently stated "What is established is that the cardiologists, in their professional judgments, did not want to send their patients to plaintiff," 71 F.3d at 1085, which clearly evidenced its independent determination of the truthfulness of the cardiologists' testimony. A proper Rule 50 analysis requires the court to refrain from making such credibility determinations.

> In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2nd Cir. 1993), quoting 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2524 at 541-45 (1971) (citations omitted).

The court's numerous credibility determinations in the face of conflicting evidence is contrary to an appropriate Rule 50 analysis which requires that "Unfavorable evidence that contradicts the favorable evidence must be disregarded." *See* 9a C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* §2529 at 300 (1994). For example, the court a) noted that Dr. Peitzman criticized petitioner for having a poor attitude, 71 F.3d at 1081, but ignored petitioner's one-year evaluation which graded his attitude as "excellent;" b) determined that Dr. Meister experienced interpersonal conflicts with Dr. Gomez, *id.*, but again ignored petitioner's one-year evaluation in which he was graded as "excellent" in the category of "interpersonal skills;" c) found that Dr. Furey would not send patients to petitioner because of his refusal to perform an emergency operation, *id.* at 1082, but ignored evidence that the patient was not an appropriate candidate for the surgery; d) determined that Drs. Furey and Marinchak had "concern[s]" about petitioner's surgical outcomes and his morbidity and mortality statistics, *id.*, but ignored evidence

that his morbidity and mortality results were favorable;[17] e) reported that Dr. Kowey found petitioner's post-operative care lacking, *id.*, but ignored the testimony of Dr. Catherine Hayward, a surgeon who worked with Dr. Gomez throughout his career at MCP, that in her experience petitioner's post-operative skills were "exceptional;" and f) credited Dr. Meister's claim that petitioner had "difficulty communicating," *id.*, but ignored the testimony of Drs. Zaren (Chairman of Surgery), Sigel (former Chairman of Surgery), and Wolf (a cardiologist) that they had no difficulty understanding petitioner. Furthermore, the court failed to account for the jury's own assessment of petitioner's communication skills.

Importantly, although the Third Circuit's discussion of the facts touched upon some of the evidence favorable to petitioner, its legal analysis portrayed petitioner in a negative light by ignoring the most compelling proof of petitioner's qualifications, skills and character. For example, the jury heard that petitioner had performed more than eight hundred (800) heart operations prior to coming to MCP, and that his assignments at MCP included some of the division's most difficult cases. Dr. Sariel Ablaza, a cardiothoracic surgeon for more than thirty (30) years, and Dr. Catherine Hayward, a general surgeon, both worked with Dr. Gomez at MCP on a weekly, and sometimes daily, basis on numerous operations and procedures and considered him to be highly skilled.[18] The

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[17] Dr. Meister also testified that he had concerns about the morbidity and mortality statistics for Drs. Spagna and Gomez. However, under cross-examination, Meister was unable to produce the statistics or back up his direct testimony with specific information. Furthermore, Dr. Meister admitted that the data had not been kept long enough to be "statistically meaningful."

[18] In *Price Waterhouse*, the Court noted that some of the harshest criticisms of Hopkins, which were gender-neutral, came from partners who knew Hopkins "only slightly." 109 S.Ct. at 1783. Similarly, the cardiologists who were critical of petitioner knew him for only a short time and admitted having very little interaction with him, presumably because none of them made any referrals to petitioner, while Drs. Ablaza and Hayward worked closely with Dr. Gomez for more than two years.

jury also considered the glowing support letters that MCP received during its recruitment of petitioner from physicians and surgeons who had worked with Dr. Gomez in the past. These doctors had known petitioner between eight (8) and fifteen (15) years and regarded him as a seasoned clinician and teacher ("[I] would allow [petitioner] to care for me or a member of my family"). The court's analysis also ignored the performance evaluations that petitioner received from Drs. Sigel and Spagna, one year into his employment, in which he was graded as "excellent" in each of the ten categories.[19] In his evaluation, Dr. Spagna stated, "Dr. Gomez is a truly devoted, gifted, outstanding cardiothoracic surgeon. I am proud to have this outstanding man in my division."

Although these conflicts raised questions of credibility for the jury, the Third Circuit stated that "The record is overwhelming that the staff cardiologists who refused to refer cases to plaintiff based their decisions on their own unsatisfactory experiences with him." *Id.* at 1084.[20] In so doing the court ignored the jury's right to determine that respondent's evidence was not credible, or was not of sufficient weight in light of petitioner's evidence of pretext, discussed *supra* and *infra,* to negate petitioner's claims of illegal bias. Although the court clearly disagreed with the jury's decision, it was not permitted to substitute its own view of the evidence for that of the jury.

In its protracted discussion of the reasons advanced by the staff cardiologists for their refusal to make patient referrals to Dr. Gomez, the court implicitly determined that the

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[19] The categories included clinical knowledge, clinical competence/skills, professional attitude, character, emotional stability and maturity, interpersonal relations, ability to work with others as a team member, work habits, personal appearance, and motivation for graduate study.

[20] The district court's credibility determinations were equally apparent. 71 F.3d at 1083, quoting Memorandum of August 12, 1994 ("There is no evidence to rebut defendant's evidence that the cardiologists' decision[s] to stop referring their patients for surgery to [ ] Dr. Gomez were by each, an exercise of independent professional judg[ ]ment, made in the best interests of their particular patients.").

staff cardiologists were charged with the responsibility for making these referrals to petitioner. This conclusion completely ignored the admission by Dr. Zaren, Chairman of Surgery, that Dr. Meister was the "main referrer" of cardiac patients for surgery and that if petitioner "wasn't getting [referrals], that's who he wasn't getting them from."[21] Under a proper Rule 50 analysis, Dr. Zaren's statement should have been accepted as true, rendering the testimony of the staff cardiologists irrelevant since they had no responsibility for making patient referrals to petitioner.[22] Importantly, the jury heard no explanation for why petitioner received no referrals *from the outset* of his employment, casting substantial doubt upon the performance-based reasoning advanced by the cardiologists and raising the inference that a decision was made *ab initio* to exclude petitioner from participation in the care of cardiology patients.

Finally, the Third Circuit's improper credibility determinations caused the court to depart from the standard of review commonly employed in pretext cases. The court stated,

> What is established is that the cardiologists, in their professional judgments, did not want to send their patients to plaintiff. Those actions are sufficient to defeat the plaintiff's position whether or not the cardiologists were objectively correct.

71 F.3d at 1085. The court's independent determination that the testimony of the cardiologists was truthful disregarded the shifting burdens analysis established by *McDonnell Douglas*

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[21] The Third Circuit stated "there is no evidence that [Dr. Meister] controlled referrals other than his own." 71 F.3d at 1085. Dr. Zaren's admission is yet another example of how the court overlooked critical parts of the record in arriving at its decision.

[22] The staff cardiologists' criticisms of petitioner were irrelevant for a second reason. Petitioner was never informed by his superiors, or anyone else at MCP, that his performance was unsatisfactory or that he received no referrals on the basis of his alleged poor performance. To the contrary, petitioner's performance evaluations, received one year into his employment, were exemplary.

Corp. v. Green, 93 S.Ct. 1817 (1973) and refined in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993) which permits a plaintiff to demonstrate that the proffered reason was a pretext for illegal discrimination. The panel usurped from the jury the critical function of determining whether respondent's reasons for its actions were true, or false and a pretext for intentional discrimination.[23] In essence, the Third Circuit determined that if a plaintiff does *not* satisfy his ultimate burden of proof with the elements of his prima facie case (in conjunction with the jury's disbelief of the defendant's reasons for its actions), then a plaintiff forfeits altogether his right to prove intentional discrimination.[24] This is directly contrary to *McDonnell Douglas* and its progeny, including *Hicks*, and to the proposition that Title VII is to be liberally construed consistent with the broad remedial purpose of eliminating workplace discrimination. *Albemarle*, 422 U.S. at 417-419; *Hamm v. City of Rock Hill*, 379 U.S. 306, rehearing denied, 379 U.S. 995 (1964).

The Third Circuit employed an improper legal analysis in its review of the district court's decision when it made numerous credibility determinations, failed to acknowledge conflicts in the evidence, and failed to view the evidence in the light most favorable to petitioner. The court's opinion conflicts with the decisions of this Court in *Wilkerson* and *Webb*, and with the decisions of each of the other circuit

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[23] *See Hicks*, 113 S.Ct. at 2749 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

[24] As this Court has stated, the defendant's production of a nondiscriminatory reason does not end the inquiry, but merely forces the analysis to proceed to the third step. *Hicks*, 113 S.Ct. at 2749, citing *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093-1095 ("The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's 'production' [ ] having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant has intentionally discriminated against [him].' ").

courts. *See* nn. 13 and 14, *supra*. If allowed to stand, a circuit court will easily be able to substitute its own view of the evidence for that of the jury whenever the court disagrees with a jury's decision. This is contrary to the intent of Rule 50 and to a plaintiff's right, which is "enshrined in the Bill of Rights and sanctified by centuries of history," to a trial by jury. *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 377 (8th Cir. 1983). The petition should be granted to protect the jury system from improper interference by the courts. Additionally, because the Third Circuit's errors were so extreme, and its analysis so one-sided, this Court should exercise its power of supervision to correct the Third Circuit's decision because under the facts, petitioner's case was wrongly decided.

V. PETITIONER WAS DENIED THE FULL BENEFIT OF THE APPELLATE PROCESS, PREJUDICING HIS ABILITY TO DEFEND THE JURY'S VERDICT, WHEN THREE JUDGES PARTICIPATED IN THE VOTE BUT ONLY TWO JUDGES CONTRIBUTED TO THE PANEL'S OPINION AND CONSIDERED HIS PETITION FOR REHEARING.

The Hon. William D. Hutchinson participated in the oral argument and decision of this case, but died without having any role in the drafting of the court's opinion. This denied petitioner the benefits of a full three-judge panel to decide his appeal, severely prejudiced petitioner in his defense of the jury's verdict, and deprived petitioner of his constitutional rights to due process and equal protection of the laws.

The Federal Rules of Appellate Procedure provide for three-judge panels to hear appeals. 28 U.S.C. §46(b). Legislators appropriately recognized that to "preserve the appearance and reality of justice, . . . [t]he disposition of an appeal should be the collective product of at least three minds." S. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982) at 1982 U.S.C.C.A.N. 11, 19 (1982). This Court has commented that "the decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and

conclusions of the third judge. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants to this Court if the case were appealed." *Ayrshire Collieries Corp. v. United States, et al.*, 331 U.S. 132, 139 (1947) (Absence of third judge required that injunction be vacated). Although the legislative history indicates that local rules might provide for panels of two in emergency situations, no such local rule has been adopted here.

The local rules do, however, standardize procedures for creating and amending panel opinions:

> The authoring judge prepares a draft opinion in accordance with the decision of the panel at conference, but the author may express any different views reached after subsequent study of the case. The opinion will set forth the reasons supporting the court's decision [ ]. After the draft opinion has been prepared [ ] other members of the panel are free to make any suggestions relating to the modification of, addition to, or subtraction from the proposed text. When one of the other two judges approves [a suggested textual revision], it becomes the proposed opinion of the court. Should the other panel members disagree with the author's draft, the opinion is reassigned by [ ] the presiding judge.

3rd. Cir LAR (Internal Operating Procedures), Chapter 5, §§5.6.1, 5.6.2 (1996). Judge Hutchinson's death prevented petitioner from deriving the full benefit of his participation in the appeal. There was no opportunity for him to disagree with the language of the opinion as written, to prepare additional or alternative language, or to write a separate opinion. Furthermore, it is possible that his views would have caused the opinion to be reassigned.

Importantly, Judge Hutchinson's death reduced by 50% the chances that petitioner's rehearing request would be put to a vote. Since panel rehearing requires only two votes, *id.* at Chapter 8.3, Judge Hutchinson's absence severely prejudiced

petitioner's chances for reconsideration generally.[25] Because petitioner's appeal raised a number of significant issues, and the panel's decision was in conflict with the decisions of other circuit courts, it is even more likely that Judge Hutchinson would have reconsidered his vote, or lobbied his fellow judges to vote to rehear the case in banc. *See id.* at Ch. 9.5. Thus, there were myriad and significant ways in which Judge Hutchinson might have altered the outcome of this appeal. The resulting prejudice to petitioner is clear.

The need for a three-judge panel for the entire appellate process is even more pronounced in cases such as this one, where a unanimous jury verdict is at stake. Juries are a "basic and fundamental feature of our system . . . [and] should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752 (1942). The importance of the jury's verdict demands the full benefit of the procedural protections accorded by the appellate process, while less than full review gives the appearance of impropriety and plants seeds of doubt as to the proper administration of justice.

Finally, petitioner was denied his constitutional right to due process when he was deprived of his statutory right to have a three-judge panel throughout the entire appeal process. Dr. Gomez was also denied the same protections accorded to other appellants and there was no rational basis for the Third Circuit's decision to allow petitioner's appeal to proceed without the full benefits of a three-judge panel. The petition should be granted to correct this aspect of the Third Circuit's decision.

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[25] The importance of Judge Hutchinson's participation is enhanced since it is unlikely that Judge Weis, who authored the opinion, would vote for rehearing.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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Of Counsel

Fernando GOMEZ, M.D., Appellant,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a/ Allegheny Health Education and Research Foundation; Medical College of Pennsylvania; Department of Veterans Affairs Medical Center; Bernard Sigel, M.D.; Howard A. Zaren, M.D.; Paschal M. Spagna, M.D.; Steven G. Meister, M.D.; Glen Whitman, M.D.; Leslie A. Miller, Esquire, Appellees.

No. 94-1899.

United States Court of Appeals,
Third Circuit.

Argued June 29, 1995.

Decided Nov. 15, 1995.

Richard J. Silverberg (argued), Richard J. Silverberg & Assocs., P.C., Philadelphia, PA, for Appellant.

J. Freedley Hunsicker, Jr. (argued), Nadia Mykytiuk Jannetta, Gregg R. Melinson, Drinker Biddle & Reath, Philadelphia, PA, for Appellees.

Robert J. Gregory, Equal Employment Opportunity Commission, Washington, DC, for Amicus-appellant.

Before: HUTCHINSON*, ROTH, and WEIS, Circuit Judges.

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* The Honorable William D. Hutchinson participated in the oral argument and decision in this case, but died before he could join or concur in this Opinion.

OPINION OF THE COURT

WEIS, Circuit Judge.

In this appeal, a staff surgeon at a hospital asserts that staff physicians refused to send patients to him because of bias based on his national origin. As a result of the lack of referrals, the hospital did not renew the plaintiff's contract of employment. After a trial, the district court entered judgment as a matter of law in favor of the hospital concluding that the evidence failed to establish impermissible discrimination. We agree and will affirm.

Plaintiff, Dr. Fernando Gomez, M.D., brought suit against the Medical College of Pennsylvania, five physicians on the staff of the College, and two other defendants asserting various causes of action, including claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the Pennsylvania Human Relations Act, 43 Pa.Cons.Stat.Ann. § 951 et seq. (1995). The complaint alleged that plaintiff had been terminated from his services at the hospital because he was of Colombian extraction. Before trial, the district court dismissed the claims against all of the defendants except the College[1] and limited the counts against it to asserted violations of Title VII, the state Human Relations Act, and breach of contract.

The Medical College of Pennsylvania is an institution that combines teaching medical students with providing

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[1] Both of the parties failed to advise the court of the status of the various defendants, requiring an extensive review of the district court's record to determine whether appellate jurisdiction existed.

medical, as well as surgical, services to the community. Members of its faculty also practice medicine in their respective specialties.

Faculty members' salaries cover both their academic and clinical activities. The College uses the proceeds from the charges made for professional services both to defray the compensation and expenses of faculty members as well as to subsidize the costs of the teaching program. Inadequate income from patient treatment can become a serious problem for the academic facility.

During 1987 the College became concerned about the lack of referrals to the Division of Cardiothoracic Surgery. In an effort to increase the number of procedures performed by the unit, the College recruited Dr. Pascal [sic] Spagna, M.D., to become Chief of the Cardiothoracic Surgery Division and a member of the permanent surgical staff. His appointment led to improvement in the volume of patients being treated in the division.

In 1988, Dr. Spagna sought help to handle the increasing number of cases being referred to him. He contacted plaintiff who was then on the surgical staff of another institution, to discuss plaintiff joining the staff and faculty at the College. In addition to assistance in the surgery itself, Dr. Spagna was interested in having an associate who could take over post-operative care, a function Dr. Spagna did not particularly enjoy. Apparently at some time before July 1988, Dr. Spagna extended an informal offer to plaintiff.

During the formal recruitment process, the Chairman of the Department of Surgery at the College, Dr. Bernard Sigel, M.D., Dr. Spagna's superior in the hospital and

academic hierarchy, interviewed plaintiff. Because the cardiology and cardiothoracic divisions work together so frequently, Dr. Spagna, as a matter of courtesy, invited Dr. Steven Meister, Chief of the Division of Cardiology, to meet with plaintiff. Dr. Meister, however, was in the Department of Medicine and did not have any responsibility for hiring surgeons.

At the conclusion of the interview, Dr. Meister sent his appraisal of plaintiff to Dr. Spagna in a letter of July 21, 1988. Dr. Meister emphasized that he would support Dr. Spagna's selection of a partner, whomever it was. However, Dr. Meister expressed reservations about the small number of heart operations and internal mammary grafts [used in coronary artery bypass surgery] that plaintiff had performed during the preceding ten years when he had been employed at a high volume surgical institution. Dr. Meister wrote that another concern was the plaintiff's "presentability." "He is a foreigner and both speaks and looks it. . . . I have some concerns that he may not be the guy who should walk into a patient's room first and discuss an operation, nor am I entirely comfortable that he is the man to be communicating with referring doctors after the surgery."

Dr. Meister then recommended Dr. Haji Shariff, M.D., who had performed well in surgery on the cardiologists' patients. Dr. Meister particularly noted Dr. Shariff's facility with the internal mammary approach. From the postoperative care standpoint, Dr. Shariff had been conscientious and had "earned the cardiology group's respect." The letter continued: "From the 'presentability' standpoint, Haji is also a foreigner, but speaks and acts very

American. In this respect he is very much ahead of Gomez."

The record does not disclose whether Spagna replied to these comments, but in a letter dated August 26, 1988, he and Dr. Sigel offered plaintiff a position in the Division of Cardiothoracic Surgery. If he accepted, plaintiff would report to the chief of that division and to the Chairman of the Department of Surgery. In addition, the College would appoint plaintiff to the position of associate professor.

The letter from Spagna and Sigel stated the offer was for a "full time, salaried position." It further read:

> D. A substantial financial advance is made by the Department of Surgery in funding this position, (i.e., [salary etc.]) and as a matter of sound financial policy, the amount so advanced is expected to be returned to the Department of Surgery from income resulting from clinical practice.

Plaintiff began his service at the College on September 12, 1988 as assistant surgeon to Dr. Spagna. Cases were referred by staff and outside cardiologists to the Spagna/Gomez team as the College's permanent cardiothoracic surgeons. Dr. Spagna usually decided whether he or plaintiff would be the primary surgeon, unless the referring physician requested otherwise.

In the period from July 1 to December 31, 1988, which included the two and one-half months when plaintiff worked with Dr. Spagna, eighty-five operations were performed, a larger number than had taken place during the preceding six-month period. In the following six

months, however, the Spagna/Gomez operations dropped from eighty-five to sixty-one. In the next six months, the number fell to fifty.

On February 12, 1989, a physician in the Department of Medicine, Division of Nephrology and Hypertension, wrote to Dr. Sigel as Chairman of the Department of Surgery, complaining about a consultation with plaintiff about a patient. The physician wrote that plaintiff "assumed an arrogant and offensive attitude on the telephone, lecturing and quizzing me as if I were a junior resident." On the back of this letter, Dr. Meister wrote: "Pat [Spagna]: This is, as you know, the latest of several complaints. I think you need to think about this long and hard." Dr. Meister finished with a postscript: "I personally don't think it's a great idea for him to speak to referring d[octo]rs or conscious p[atien]ts."

On September 5, 1989, Dr. Meister wrote to Dr. Leonard Ross, Executive Vice Dean of the College, reporting some interpersonal conflicts with plaintiff and describing two recent unfavorable incidents. The first involved Dr. Nelson Wolf's patient who had been operated on the previous day. While making rounds, Dr. Wolf, the attending cardiologist, gave the patient a carotid sinus massage, a treatment that plaintiff later told the patient's family had caused a stroke. Dr. Wolf strongly disputed the plaintiff's cause and effect diagnosis, as did Dr. Meister.

The other incident involved a post-operative patient who had been discharged from the College and, on the same day, was admitted to another hospital with complications. The patient refused to return to the College for

further contact with "Dr. Hitler," as he referred to plaintiff. Dr. Meister concluded that he and Dr. Wolf had "separately indicated to Dr. Spagna that we do not want Dr. Gomez involved with our patients – at least while they are conscious."

Dr. Kevin Furey, M.D., a cardiologist not on the staff of the College, testified at trial that he refused to send patients to Dr. Spagna because of poor results in cases, and because on one occasion plaintiff refused to operate on a patient in an emergency situation.

Dr. Roger Marinchak, a staff cardiologist, testified that he, too, had been concerned about Spagna/Gomez surgical outcomes, and for that reason, no longer referred cases to them. Moreover, plaintiff had dealt with Dr. Marinchak as if he were interfering with the patients. Dr. Peter Kowey, another staff cardiologist, also asserted that he had been dissatisfied with the morbidity and mortality results from the Spagna/Gomez team.

In addition, Dr. Kowey had a number of disagreements with the team about proper post-operative treatment of patients. Plaintiff, on the other hand, testified that he believed it was in the best interests of the patients for the surgeon to have the primary responsibility for post-operative care.

In September 1989, Dr. Sigel and Dr. Spagna both prepared glowing reviews of the plaintiff's professional competency and patient care. Dr. Sariel Ablaza, who also specialized in cardiothoracic surgery, testified that plaintiff was a competent "no nonsense" surgeon who believed that he, and not the cardiologist, should provide

post-operative care for the patient. Dr. Ablaza also commented favorably on the plaintiff's presentations to residents at the College, saying that he was "very serious and is all business."

Plaintiff testified that in addition to the patients assigned to the Spagna/Gomez team, he took all cases coming from the trauma unit, approximately ten per year. At the beginning of his tenure, plaintiff and Dr. Spagna would alternate being the primary surgeon on other cases referred to the team. Later, Dr. Spagna said that he had been instructed by the referring physicians to do the surgery himself. Dr. Spagna told plaintiff that he hoped the situation would change. However, it did not.

Dean Ross was advised of the conflict between the Spagna/Gomez team and the cardiologists. Ross met with the Chairmen of the Departments of Surgery and Medicine, as well as Drs. Spagna and Meister in an unsuccessful attempt to resolve the problem. Dean Ross testified that the cardiologists felt "in all due professional conscience," that they could not refer cases to the Spagna/Gomez team because of mortality and morbidity results as well as poor communication. He also had been told by Dr. Meister that plaintiff had difficulty communicating and would become frustrated and speak very sharply to patients and their families.

Dr. Sigel left the position as Chairman of the Department of Surgery in October 1989 and was succeeded by Dr. Howard Zaren, M.D. Dean Ross told Dr. Zaren that he needed to strengthen the divisions that were weak in surgery. As a consequence, Dr. Zaren recruited new chiefs for neurosurgery, plastic surgery, and in March 1990,

contacted Dr. Glen Whitman, a highly qualified individual, as a prospective chief for the Cardiothoracic Surgery Division.

During negotiations in the months following, Dr. Whitman made it clear that he would be unwilling to accept the position if it meant assuming financial responsibility for the Spagna/Gomez team. Dr. Whitman had not recruited them and wished to build his own unit.

At this juncture, the College was in a very difficult financial condition, and had just been acquired by Allegheny General Hospital of Pittsburgh. Dean Ross and Dr. Zaren decided plaintiff had to be discharged, and that Dr. Whitman would take over as Chief of the Cardiothoracic Surgery Division following a six-month probationary period. Dr. Spagna agreed to the realignment and also accepted a fifty percent reduction in his compensation. He died unexpectedly in 1992.

In a June 26, 1990 meeting, Dr. Zaren and Dr. Spagna told plaintiff he was "going to be fired from the hospital after December 30 of 1990." On the following day, plaintiff received a formal letter renewing his tenure for only six months.

After plaintiff requested a reason for his termination, Dr. Zaren wrote a letter stating that "because you have generated few, if any, new patient referrals to the Division of Cardiothoracic Surgery, it is not economically feasible for the Department to continue to exhaust its limited resources to employ you." Dr. Zaren did, however, recommend the plaintiff's termination date be extended to June 30, 1991, and suggested that plaintiff

use the additional time to seek new employment. That effort, however, proved largely unsuccessful.

The case was submitted to the jury, which found on special interrogatories that plaintiff had proved *"but for* his national origin/race (Columbian) [sic], the Medical College of Pennsylvania (MCP) would have renewed his employment contract annually," and that his damages totaled $2,484,000.

In ruling on post-trial motions, the district court granted judgment as a matter of law to the defendant, observing that although plaintiff was of Colombian origin: "No attempt was made to show that [plaintiff] had mannerisms which were thought to be peculiar to Colombians." The court commented that although the plaintiff's claim hinged entirely on the alleged animus of Dr. Meister, there was no evidence that he either directed or made an effective recommendation for the non-renewal of the plaintiff's contract. "The only evidence is that Dr. Meister's superiors made the non-renewal decision, and as to them, no national origin discrimination animus is assigned."

In reviewing the testimony, the trial judge commented: "There is no evidence to rebut defendant's evidence that the cardiologists' decision to stop referring their patients for surgery to both Dr. Spagna and Dr. Gomez were, by each, an exercise of independent professional judg[ ]ment, made in the best interests of their particular patients." The court concluded, "no rational jury could have found that MCP [the College] was motivated by anti-foreign/race animus toward the plaintiff."

Plaintiff has appealed, arguing there was sufficient evidence from which the jury could find that Dr. Meister did not refer patients because of discriminatory bias, and that he exercised his influence to have the College terminate the plaintiff's employment. Plaintiff did not appeal the pre-trial dismissal of Dr. Meister and the other physicians.

I.

In reviewing the grant of judgment as a matter of law following a trial, an appellate court applies the same standard as the trial court. *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir.1992). The question is whether, in viewing the evidence in the light most favorable to the losing party, no jury could decide in that person's favor. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir.1993). We do not follow the rule that a scintilla of evidence is enough. The question is not whether there is literally no evidence supporting the unsuccessful party, but whether there is evidence upon which a reasonable jury could properly have found its verdict. *Id. Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir.1978).

A judgment as a matter of law must be sustained if the record is critically deficient of the minimum quantum of evidence from which the jury might reasonably afford relief. *Smollett v. Skayting Dev. Corp.*, 793 F.2d 547, 548 (3d Cir.1986). In a case raising claims of discrimination in employment, we will affirm a judgment as a matter of law if the record lacks substantial evidence in support of

the plaintiff's contention that but for unlawful discrimination he would not have been discharged. *Billet v. CIGNA Corp.*, 940 F.2d 812, 815 (3d Cir.1991).

Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, prohibit discrimination in employment based on race or national origin. The state Act is construed consistently with interpretations of Title VII. *Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860, 871 (1980); *Kryeski v. Schott Glass Technologies, Inc.*, 426 Pa.Super. 105, 626 A.2d 595, 598 (1993).

In a Title VII suit, a plaintiff may meet his initial burden of establishing a prima facie case by invoking the presumption discussed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), but once the defense has produced rebuttal evidence, the question becomes whether the plaintiff has proved discrimination. *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, ___, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

If a case has been tried to a jury on the merits, the prima facie issue is irrelevant and the question is whether the plaintiff has established by a preponderance of all the evidence that discrimination was a determinative factor in the employment decision. *Billet*, 940 F.2d at 817. A similar review is applicable where, as here, the jury's findings were made in connection with a claim accompanying the Title VII count. *Barber v. CSX Distribution Servs.*, 68 F.3d 694 (3d Cir.1995).

In *Miller v. Cigna*, 47 F.3d 586, 588 (3d Cir.1995) (en banc), we held that "the plaintiff's burden is to prove that

age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." The plaintiff has the burden of showing there is a "but for" causation between the plaintiff's status and the employer's adverse action. *Id.* at 595. That same standard applies in the case at hand. *Accord Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir.1994) (plaintiff must show that "but for the protected characteristic, the plaintiff would have been hired (or promoted).").

II.

The plaintiff's arguments here are somewhat unusual. He does not dispute the fact that the College had a valid economic reason for not renewing his contract. He concedes, in effect, that he did not receive enough referrals to support his position on the staff. Consequently, the decision of Dean Ross and Dr. Zaren to terminate plaintiff because of financial reasons stands uncontradicted and unimpeached. Plaintiff goes a step further, however. He contends that because the cardiologists' unwillingness to refer cases to him was caused by discriminatory animus, the College must bear responsibility for the result.

Assuming *arguendo*, but specifically not deciding, that the cardiologists' conduct could be imputed to the hospital, there are critical gaps in the evidence that are fatal to the plaintiff's theory. It is necessary to bear in mind that the plaintiff's claim rests on the proposition that he was discriminated against by referring cardiologists because he was Colombian. Whatever may be the basis for inferring a legally impermissible bias on the part

of Dr. Meister, there is absolutely no evidence that would permit such a finding against the other eight or nine cardiologists on the permanent staff of the hospital or the cardiologists outside the hospital, such as Dr. Furey.

The record is overwhelming that the staff cardiologists who refused to refer cases to plaintiff based their decisions on their own unsatisfactory experiences with him. The testimony demonstrates a sense of fierce independence on the part of the individual cardiologists leading them to make referrals based on their professional judgment as to what was best for their patients. One cardiologist complained to Dr. Meister that he would no longer send cases to the Spagna/Gomez team because "I simply was not going to take these patients' lives and place them in jeopardy simply because they [Spagna/Gomez] were the full-time surgeons at MCP when I had other alternatives. . . . And if I had to do it all over again I'd do exactly the same thing." Plaintiff himself agreed that the welfare of the patient is the most important consideration – that qualifications of the surgeon, not personal likes and dislikes, should control.

The cardiologists who testified cited specific instances in which they found the surgical results of the Spagna/Gomez team to be wanting. In a number of cases, they cited to deficiencies in the plaintiff's post-operative treatment of their patients. One cardiologist said that one of his patients "basically threatened to put out a contract on his life if he let [plaintiff] come back into his room." No doubt, there was some hyperbole in that comment, but it was a dramatic and telling reflection of the patient's frame of mind.

Although Dr. Meister did forward complaints by other cardiologists and attempted to resolve the conflicts through the appropriate channels, there is no evidence that he controlled referrals other than his own. Nor was there any evidence that Dr. Zaren and Dean Ross influenced the cardiologists' choice of surgeons.

Plaintiff aims most of his fire at Dr. Meister, but here, again, the record does not support any inference that he was biased because plaintiff was a native of Colombia. The letter of July 1988, in which Dr. Meister refers to plaintiff as a "foreigner," also praised another "foreigner," Dr. Haji Shariff, who was of Indian or Pakistani extraction. Dr. Meister had referred cases to Dr. Shariff in the past and resumed doing so after he became dissatisfied with the Spagna/Gomez team. Dr. Meister also sent patients to Dr. Ablaza, who had a Filipino background.

It bears mentioning that Dr. Meister's July 1988 letter, written two years before the plaintiff's termination, was ineffective even in the hiring decision. The comments are temporally remote and there is no evidence that the persons ultimately responsible for the plaintiff's termination ever saw or heard of the letter.

Dean Ross became aware of Dr. Meister's misgivings about the plaintiff's "bed-side manner" not long after plaintiff began his service at the College. Dean Ross understood that Dr. Meister objected to the plaintiff's lack of communication skills because he spoke very sharply or curtly to patients and was not filling the patients' tremendous emotional needs. That characteristic is not contended to be typical of Colombians.

The plaintiff's theory also takes little account of the hierarchial organization of the College. Dr. Meister was the Chief of the Cardiology Division, but reported to Dr. Kaye, Chairman of the Medical Department, who, in turn, was under the direction of the Dean, Dr. Ross. Plaintiff, on the other hand, was in the Cardiothoracic Surgery Division, headed by Dr. Spagna, who, in turn, reported to Dr. Zaren, Chairman of the Surgery Department, who was under the direction of the Dean, Dr. Ross. Thus, Dr. Meister was outside the chain of decision-makers who had the authority to hire and fire plaintiff.

Because Dr. Meister had no supervision over plaintiff, such cases as *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747 (3d Cir.1990), *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir.1990), *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir.1988), and *EEOC v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir.1994), are not on point. The evidence before us more properly falls into the category of stray remarks by non-decision makers, which are inadequate to support an inference of discrimination by the employer. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 779 (3d Cir.1994); *Fuentes*, 32 F.3d at 767; *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir.1992).

We also observe that it was not necessary for defendant to establish that plaintiff was an incompetent surgeon, and such is not the proof here. As the district court emphasized, this is not a malpractice case. What is established is that the cardiologists, in their professional judgments, did not want to send their patients to plaintiff. Those actions are sufficient to defeat the plaintiff's position whether or not the cardiologists were objectively correct. The proper exercise of medical judgment in the

best interests of patients is of critical importance to society, and courts must not overlook that consideration in arriving at a proper resolution in disputes such as this.

Viewed in the plaintiff's favor, the record here establishes good faith differences between plaintiff and other members of the staff over the proper treatment of patients at the hospital as well as personality conflicts unrelated to invidious discrimination. Testimony of that nature does not meet the minimum quantity of evidence needed to avoid judgment as a matter of law.

As we commented in *Ezold*, Title VII "does not require employers to treat all employees fairly . . . the law limits its protection against that unfairness to cases of invidious illegal discrimination." *Ezold*, 983 F.2d at 542. And "unfortunate and destructive conflict of personalities does not establish . . . discrimination." *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 182 (3d Cir.1985). "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S.Ct. 1775, 1784-85, 104 L.Ed.2d 268 (1989).

Because the plaintiff failed to establish his claim of illegal discrimination, the judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1899

FERNANDO GOMEZ, M.D.,

Appellant

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and WEIS, *Circuit Judges*

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

/s/ Jane Roth
Circuit Judge

Dated: JAN 12 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1899

FERNANDO GOMEZ, M.D.,

Appellant

v.

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Appellees

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civ. No. 92-5048

Present: Hutchinson*, Roth and Weis, *Circuit Judges*

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*The Honorable William D. Hutchinson participated in the oral argument and decision in this case, but died before he could join or concur in this Opinion.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 29, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 12, 1994, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1899

FERNANDO GOMEZ, M.D.,

Appellant

v.

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ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 15, 1995

Certified as a true copy and issued in lieu of a formal mandate on January 22, 1996.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERNANDO GOMEZ	:	CIVIL ACTION
v.	:	NO. 92-5048
MEDICAL COLLEGE OF PENNSYLVANIA	:	

MEMORANDUM

GILES, J.

(Filed August 12, 1994)

FACTS

Fernando Gomez, M.D., a native of the country of Colombia, claimed against the Medical College of Pennsylvania ("MCP") for national origin and race discrimination when his one-year employment contract was not renewed by the MCP Board of Directors. On September 12, 1988, Dr. Gomez became employed by MCP as a cardiothoracic surgeon and associate professor (non-tenured) and as the surgical group partner of Patrick Spagna, M.D., chief of the cardiothoracic division of the department of surgery.[1] Approximately one year earlier, Dr. Spagna had been hired as MCP's "flagship," or leading, cardiothoracic surgeon, and he was responsible for expanding the reputation of the service division in the referral and patient community to attract additional heart surgery cases. Dr. Steven G. Meister, chief of the cardiology division of the department of medicine, and Dr. Nelson Wolf, cardiologist and head of the catherization

[1] Dr. Spagna died in the summer of 1992, Tr. 5/24/94, N.T. 61, and was not deposed before his demise.

laboratory, were actively involved in recruiting Dr. Spagna, who was known to them personally. Already having more referrals than Dr. Spagna could handle himself, and projecting a substantial additional caseload, MCP authorized Dr. Spagna to choose someone to augment that surgical division. Dr. Spagna chose Dr. Gomez, whom he knew personally, although Drs. Meister and Wolf expressed reservations about Dr. Gomez and expressed preferences for another surgeon, who happened to be of East Indian descent. Originally hired for a six-month period, Dr. Gomez was awarded another contract by MCP for an additional year. Renewal was not automatic and was subject to action by the Board of Directors of MCP.

On June 27, 1990, Dr. Gomez was notified that his contract would be renewed for only six months more and that it would not be renewed beyond the end of that period. When he protested that this was not a sufficient time period, he was given a non-renewable contract for one full year and was encouraged to use that time to find a position elsewhere while receiving salary from MCP. The reasons given for his contract non-renewal were economic; namely, that he had not generated referrals for cardiothoracic surgery, which referrals were necessary to cover the cost burden of his contract, and MCP, being in financial straits, could not afford to continue to underwrite that cost.

Dr. Gomez, believing that the reasons advanced by MCP's Board were pretexts for intentional national origin/race discrimination, brought suit on August 31, 1992 against MCP under Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. § 2000e et seq.,[2] with pendent state law claims under the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 951 et seq. and for common law breach of contract. Dr. Gomez alleged that his race was Colombian. On May 26, 1994, following a trial on the merits, a jury found that Dr. Gomez was the victim of national origin/race discrimination and awarded him back pay, front pay and state law compensatory damages totalling $2,484,000. The verdict was molded into a judgment order dated May 31, 1994.[3] On June 15, 1994, alleging that the jury verdict was irrational and otherwise contrary to law, MCP filed a timely Motion for Judgment as a Matter Of Law or a New Trial and a Motion for Reduction of Damages or a New Trial on Damages. These motions have been vigorously opposed by plaintiff. For the reasons that follow, the court grants MCP's motion for judgment as a matter of law. Consequently, the defendant's remaining motions will not be addressed.

MOTION FOR JUDGMENT AS A MATTER OF LAW

Rule 50(b) of the Federal Rules of Civil Procedure allows a party timely to move for judgment as a matter of

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[2] 42 U.S.C. § 2000e-2 reads:

> It is unlawful to fail or to refuse to hire or to discharge any individual . . . because of race, color, religion, sex or national origin.

[3] At oral argument on July 15, 1994, the court further molded the verdict to reflect Dr. Gomez's actual earnings at the Cooper Medical Center of $274,699.27.

law following a jury verdict.[4] The standard governing the grant of a renewed motion for judgment as a matter of law is identical to that governing a motion for directed verdict. *Keith v. Truck Stops Corp.*, 909 F.2d 743, 744-45 (3d Cir. 1990). Where a party moves for a Rule 50(a) directed verdict a court must ask if in "viewing the evidence which has been tendered and should have been admitted in the light most favorable to the opposing party, no jury could decide in that party's favor." *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232 (3d Cir. 1993) (citing *Indian Coffee Corp. v. Proctor and Gamble Co.*, 752 F.2d 891, 894 (3d Cir.), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985)).

Similarly, the relevant inquiry in determining a renewed motion for judgment as a matter of law is not "whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Walter v. Holiday Inns*, 985 F.2d at 1238, (citing *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir.

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[4] Fed.R.Civ.P. 50(b) reads in pertinent part:

> Whenever a motion for judgment as a matter of law at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.

1978))).[5] Although juries and courts have clearly defined roles, a court may set aside a jury's verdict where a clear injustice would result from a denial of judgment as a matter of law. *Northeast Women's Center, Inc. v. McMonagle*, 689 F.Supp. 465, 468 (E.D.Pa. 1988).

DISCUSSION

1. Title VII

The burden of proof in discrimination cases was most recently set forth in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). There, the Supreme Court reaffirmed the burden of proof scheme set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In a case where a non-class action plaintiff intends to show discriminatory treatment in private sector employment, he must first establish a prima facie case of unlawful discrimination. *St. Mary's*, 113 S.Ct. at 2747.[6]

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[5] "The court must find as a matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. The motion may be granted only when without weighing the evidence, there can be but one reasonable conclusion as the proper judgment. Where there is conflicting evidence which could lead to inconsistent conclusions, a [motion for judgment as a matter of law] should not be granted." *Marley v. City of Allentown*, 774 F.Supp. 343 (E.D.P. 1991) (citing *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465, 468 (E.D. Pa. 1988)).

[6] *See, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10. (1981) ("[T]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.").

To establish a prima facie case of national origin discrimination the plaintiff must show that (1) he was a r[illegible]ber of a protected class; (2) he was qualified for the job; and (3) he was discharge while other employees not in his class were retained. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). A plaintiff's establishment of a prima facie case shifts the burden of production to the defendant who, in order to rebut the prima facie presumption, must present legitimate and nondiscriminatory reasons for the adverse action taken against the plaintiff. *St. Mary's*, 113 S.Ct. at 2747. The defendant need not convince the court or jury that it was actually motivated by the reasons given, but need only raise a genuine issue of fact as to whether it did discriminate. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Evidence that may allow the trier of fact to conclude rationally that discriminatory animus did not motivate the employment decision will cause the "presumption to drop from the case," requiring more specific evidence on the part of the plaintiff to maintain the claim. *Burdine*, 450 U.S. at 255 n. 10.

A plaintiff must have the opportunity to show that the employer's proffered reasons were merely "pretextual," and that discriminatory animus was the true motivation behind the defendant's action. *St. Mary's*, 113 S.Ct. at 2747-48; *Burdine*, 450 U.S. at 256. A plaintiff may not prevail on a mere showing that the defendant's proffered reasons are false, but must prove a discriminatory animus. In fact, in a pretext case such as this, "the proof of pretext must be so strong as to preclude anything other than discrimination from playing a causal role in the challenged action. Only a finding that discrimination was

the motive will impose liability on the employer." *May v. Hobart Corp.*, 839 F.Supp. 309, 316 (E.D.Pa. 1993) (emphasis in original). Where the plaintiff is unable to rebut the employer's proffered reasons by showing that discriminatory animus was the sole reason for adverse action, the employer's reasons must be taken as true.

2. Dr. Gomez's prima facie case

National origin refers not to an individual's citizenship, but to the country from which an individual's forbearers came. *Espinoza v. Farah Mfg Co.*, 414 U.S. 86, 89, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973) (citing 110 Cong. Rec. 2549 (1964)). Dr. Gomez's Colombian origin establishes his membership in a protected class of individuals.[7] In order to establish the second prong of his prima facie case

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[7] Because Dr. Gomez has identified his race as Colombian, the defendant must be subjectively aware of this characteristic in order to intentionally discriminate against him due to his Colombian race. *See, Robinson v. Adams*, 847 F.2d 1315 (9th Cir. 1987) (*McDonnell Douglas* test does not specifically require knowledge of race but dicta suggests employer cannot intentionally discriminate against employee of protected class if unaware of protected status).

The plaintiff also identifies his national origin as Colombian. The holding of *Espinoza's* that national origin does not encompass citizenship, indicates an intention by Congress that Title VII protect against discrimination due to *immutable* characteristics such as sex, race, and national origin. Citizenship may be changed while national origin may not. Arguably, discriminatory animus need not be directed specifically at Dr. Gomez's Colombian origin, but only at the perception of his being "not American enough."

– his qualification for the position – Dr. Gomez introduced his curriculum vitae into evidence. He contends that at all times he performed his side of the contracts fully and competently. To establish the final element of his prima facie case, Dr. Gomez attempted to show that he was treated differently because of his being foreign-born.[8] Dr. Gomez alleges that despite his satisfactory performance of the contracts, he was replaced by Dr. Glenn Whitman, who was not a member of the protected class.

3. MCP's rebuttal evidence

In response to the plaintiff's prima facie case, MCP produced evidence that its decision not to renew Dr. Gomez's contract was motivated by two factors: first, the financial position of the college and the department of surgery, in particular, and second, concerns over the quality of patient care provided by the Spagna/Gomez cardiothoracic group or division. At trial, evidence was introduced to show that a) Dr. Gomez personally received no referrals; b) referrals to the full-time division continued to decline; c) MCP was in a difficult financial position; d) the department of surgery was in financial straits; e) Dr. Whitman, the newly recruited chief of the division of cardiothoracic surgery, was unwilling to be responsible for the contract costs of Drs. Gomez and Spagna;[9] and f) Dr. Whitman did not replace Dr. Gomez but that he was

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[8] No attempt was made to show that Dr. Gomez had mannerisms which were thought to be peculiar to Colombians.

[9] *See* Tr. 5/24/94, N.T. 57-61 (Zaren).

recruited to replace, and did replace, Dr. Spagna as chief of the division.

Dr. Gomez's argument hinges entirely on the claimed animus of Dr. Meister. Dr. Gomez's principal claim is that Dr. Meister, the chief of the division of cardiology, directed the non-renewal of his contract or made an effective recommendation for non-renewal of the same. There is no evidence to support either contention. The only evidence is that Dr. Meister's superiors made the non-renewal decision and, as to them, no national origin discrimination animus is assigned.

Dr. Howard Zaren, chair of the department of surgery, made the decision to recommend the non-renewal of Dr. Gomez's contract. (Tr. 5/24/94, N.T. 63). In plaintiff's case-in-chief, Dr. Zaren testified that Dr. Gomez's national origin had nothing to do with the decision not to renew. Ibid. Further, in plaintiff's evidence, it was established that Dr. Gomez's accent was not a factor in his decision. Dr. Zaren had spoken to Dr. Bernard Sigel, his predecessor as department chair, about the complaints of some residents and nurses about Gomez's loud and intimidating speech which made them fearful of dealing with Dr. Gomez. (Tr. 5/24/94, N.T. 67). Dr. Zaren testified that "Dr. Sigel said to me that he knew Dr. Gomez personally and, in general, that this would not be a problem, and that was [my] experience also." *Ibid*. Given that this testimony was presented in the *plaintiff's* case, and no contrary evidence was given, no rational jury could find that Dr. Zaren's decision not to renew Dr. Gomez's contract was because of his accent or his national origin.

Dr. Zaren's recommendation that Dr. Gomez's contract not be renewed was, in fact, a response to the requirement of the President and Dean of MCP, Dr. Leonard Ross, that the MCP "create a strong department of surgery which in turn dictated a strong division of cardiothoracic surgery . . . both academically as well as financially . . . because of the necessity to support the medical education programs." (Tr. 5/24/94, N.T. 84-85). It is undisputed that the poor financial performance of the entire department of surgery, not just cardiothoracic surgery, had had a negative impact on the budget of the institution, was pushing MCP toward bankruptcy, and had put under threat the education of the MCP students. *Id.* at 71-75. Dr. Zaren was directed by Dean Ross to improve the financial performance of the department. *Id.* at 72. Dr. Zaren recruited three new chiefs of service, a chief of neurosurgery, a chief of plastic surgery and a chief of cardiothoracic surgery, Dr. Whitman. *Id.* at 51. However, particular emphasis was placed on the need to strengthen the cardiothoracic surgery division within the department of surgery because the Spagna/Gomez team was not strong financially and was contributing nothing to the support of the MCP institution. These reasons were not rebutted and therefore, the economic need to make a change in the Spagna/Gomez team was not challenged. Consequently the mere fact that Dr. Gomez was adversely impacted by the need to change is not a basis from which a trier-of-fact could rationally infer causal national origin/race discrimination.

It is further undisputed that there arose an irreconcilable difference between the department of surgery and

the department of medicine and that MCP was suffering financially as a result. As Dean Ross put it:

> the cardiologists felt on several grounds that they could not in all due professional conscience refer their patients for cardiothoracic surgery to the full-time team . . . in the division of cardiothoracic surgery . . . that there was first a problem with the mortality and morbidity of the full-time cardiothoracic surgeons . . . [A]nd that secondly there was a serious problem in the communication between the full-time members of the division of cardiothoracic surgery and the patients, their families and the referring physicians.

(Tr. 5/24/94, N.T. 76-77). The chairs of the departments of medicine and surgery, Drs. Kaye and Zaren, respectively, had the responsibility of resolving the disputes. (*Id.* at N.T. 78). There is no rebuttal evidence that these reasons were not matters of serious medical concern or that Dr. Kaye or Dr. Zaren in any way considered Dr. Gomez's national origin/race in their resolution discussions.

Instead, the cardiology division cited the mortality and morbidity statistics of the Spagna/Gomez group as being excessive for their patient populations in comparison with the other non-staff groups doing such surgeries. (Tr. 5/18/94, N.T. 84). Dr. Meister testified that there were more heart attacks and unexplained deaths occurring during surgery performed by the Spagna/Gomez team than is usual during this type of surgery. (*Id.*). Dr. Kowey testified similarly that, from his observations of his own patients, there was an inordinately high mortality rate and unexplained surgical complications, such as bleeding from wounds and an "inordinately high infection rate,"

during routine surgical procedures. (Tr. 5/25/94, N.T. 15-16). These observations were substantiated by Dr. Van Decker (Tr. 5/24/94, N.T. 198; re-ops for bleeding at chest closure sites), Dr. Furey (Tr. 5/24/94, N.T. 140-41; poor surgical results), and Dr. Marinchak (Tr. 5/24/94, N.T. 12; Dr. Spagna's poor morbidity rates). Plaintiff offered no rebuttal evidence.[10] While Dr. Gomez testified that he believed his group's mortality rate was acceptable, (Tr. 5/25/94, N.T. 23-24), no evidence was offered as to what it was in comparison to the other surgical groups or that the statistics were, in fact, acceptable to the referring cardiologists, or acceptable to doctors other than himself. No rebuttal testimony was offered at all as to the morbidity statistics. Furthermore, Dr. Gomez cannot separate himself from the mortality and morbidity statistics for the Spagna/Gomez group and place all the blame on Dr. Spagna.. For at least the first six months of his employment, he was the primary surgeon during half of the surgeries referred because he alternated as primary with Dr. Spagna. (Tr. 5/17/94, N.T. 21, 23). Moreover, even when he was assisting, he readied the patient extensively, opening the chest and harvesting the connecting vein. After Dr. Spagna completed the heart vein by-pass itself,

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[10] Dr. Gomez's attorney suggested to the jury during closing argument that because Gomez was never made aware of these complaints or directly confronted by the cardiologists with their specific concerns, they could infer that the complaints were merely aftertthoughts in the face of this litigation. (Tr. 5/25/94, N.T. 106). However, no such inference can be made. Dr. Ross testified that the protocol at MCP required doctors with complaints to report to the chair of the department, who would then be required to report to the chief of the division. (Tr. 5/24/94, N.T. 69).

Dr. Gomez completed the operation, which included closing the chest. (*Ibid.*)

Dr. Gomez's attorney argued to the jury that the cardiologists' refusal to refer patients to the Spagna/Gomez team showed that "they weren't concerned with care of the patients." (Tr. 5/25/94, N.T. 101). There was no record support for such an allegation. No jury could rationally conclude that the mortality and morbidity rates observed by these cardiologists did not give them cause to refer their patients to other surgical groups. To the contrary, there is evidence, under these circumstances, that these cardiologists had a professional duty to their patients, as they testified, *not* to refer them to the Spagna/Gomez team.

With respect to the serious concern about the communication problems of the Spagna/Gomez group, no jury could rationally conclude, as plaintiff's attorney argued, that the problem was Dr. Gomez's accent. There is no evidence to support that contention. His accent, including his loudness, presented no problem for Dean Ross, Dr. Zaren, Dr. Sigel, or presumably Dr. Kaye, who was not called as a witness. (Tr. 5/24/94, N.T. 32-34). Not only were they the decision-makers about whether Dr. Gomez continued his employment at MCP, they were also the medical arbiters and evaluators of the physicians' reports to them in their departmental capacities. There is no evidence that any one of them understood even Dr. Meister's reports in relation to patient care as a criticism of Dr. Gomez's accent. (Tr. 5/18/94, N.T. 151-52). Rather, there was an understanding by Dean Ross and other cardiologists that Dr. Gomez had spoken very sharply or curtly to some patients and their families and that this

was medically contrary to the emotional needs of those individuals. (Tr. 5/24/94, N.T. 30-34, 80-81). However, there is no evidence that Dr. Ross understood this to be the only aspect of the communications problem described by the cardiologists, generally.

For example, the cardiologists also complained that Dr. Gomez was not communicating properly or effectively with the referring physicians, and the referring cardiologists. (Tr. 5/24/94, N.T. 80-81). Because this evidence was not rebutted by plaintiff, no rational jury could find that these complaints, referred through Dr. Meister as chief of the division of cardiology, were manifestations of bias. Dr. Meister's several memoranda to Dr. Kaye, to Dr. Zaren and to Dr. Ross referenced complaints of cardiologists directed to him as chief, complaints which he was obligated to pass on to his superiors and to have addressed. (*Id.* at 79). The memoranda concerning patents' communications were supported by patient complaints. (Tr. 5/18/94, N.T. 68; *see*, p-20, Dr. Gomez called "Dr. Hitler" by patient's wife and N.T. 131, patient threat to put contract out on life of doctor.)

All of the staff cardiologists complained about Dr. Gomez's approach to post-operative care. It was his policy and practice to exclude the cardiologists from the care of their own patients after the patient returned from the recovery room. Dr. Ablaza, a witness called by plaintiff, testified that Dr. Gomez "doesn't . . . trust the cardiologist too much in managing post-op patients . . . he wants to do it by himself." (Tr. 5/18/94, N.T. 110). According to Dr. Marinchak, this was contrary to the way in which the MCP cardiologists had related to their patients before Dr. Gomez came and contrary to their understanding of the

professional relationship between cardiology and cardiothoracic surgery. (Tr. 5/25/94, N.T. 7-8) (*see also* Dr. Van Decker, 5/24/94, N.T. 198; Dr. Kowey, Tr. 5/25/94, N.T. 17-18). Dr. Kowey put it this way:

> So, we thought part of the process should be that the fellows and the surgeons and the cardiologists should all meet together and discuss the problems. Well, it wasn't happening. In fact, the opposite was happening, we were at loggerheads with the surgeons over many post-operative management issues and we thought that was directly contributing to the patient's outcome and we simply weren't going to put up with it any more. So, we stopped sending patients to them.

(5/25/94, N.T. 17-18).

None of this testimony was rebutted by Dr. Gomez. Indeed, Dr. Gomez agreed that the cardiologists were secondary post-operatively. He stated, "I believe that the first responsible of a patient, surgical patient is the surgeon who operate the patient, and the other people are secondary in the treatment of the patient." (Tr. 5/17/94, p. 126. Moreover, Dr. Gomez did not show that after he left the post-operative care relationship between the cardiologists and the staff cardiothoracic surgeons remained the same. MCP showed that the post-operative relationship that had existed prior to Dr. Gomez was very important to the cardiologists. Dr. Whitman explained that he restored that relationship. (Tr. 5/18/94, N.T. 86-88; 5/24/94, N.T. 161-162). Unrebutted, the MCP cardiologists' reasons for being unhappy with operative and post-operative care under Dr. Gomez and/or Dr. Spagna have to be regarded as presumptively valid, *McDonnell Douglas*

Corp. v. Green, 411 U.S. at 805, and are sufficient to rebut the plaintiff's prima facie case. *Burdine*, 450 U.S. at 255.

MCP introduced evidence from six cardiologists, who gave various specific medical reasons explaining why they stopped referring patients to the staff cardiothoracic surgeons. Dr. Van Decker, who worked in a cardiology group with Dr. Meister, testified that he eventually stopped referring to the Spagna/Gomez surgery group because the open-heart surgery statistics were unacceptable for his patients. (Tr. 5/24/94, N.T. 197). He said that he observed recurrent bleeding problems in his surgical population resulting from improper chest closures. These required a number of early reoperations. (*Id.* 198).

Dr. Furey, who was not a staff cardiologist, but a member of the volunteer medical staff, testified that he initially referred cases to the Spagna/Gomez group because of the reputation that Dr. Spagna had enjoyed at Graduate Hospital and at MCP but stopped because of Dr. Spagna's poor surgical results. (Tr. 5/24/94, N.T. 140). Further, he stated that there were two instances which caused him to be unhappy with Dr. Gomez: Dr. Gomez ignored him at the bedside of his patient who had suffered a stroke following surgery, and did not communicate with him at all about the situation. This, he thought was unprofessional. (*Id.* at 141). Second, Dr. Gomez exercised poor medical judgment, in his opinion, when he curtly refused, without explanation, to perform emergency heart surgery on Dr. Furey's patient and abruptly walked out on the patient when there was no other available surgeon. Hours later, another surgeon was located who did perform successfully the very surgery that Dr. Gomez had refused to do. (*Id.* 141-43, 146-47). Dr.

Furey felt that he and his patient had been treated poorly by Dr. Gomez. Dr. Furey told Dr. Meister, in his capacity as chief of cardiology and Dr. Spagna, in his capacity as chief of cardiothoracic surgery, that because of the above incident he could never refer cases to the full-time staff again. (*Id.* 142).

Dr. Marinchak, associate professor of medicine who specializes in cardiac rhythm problems, or electrophysiology, testified that an inadequately explained death on the operating table of a referred patient, for whom the mortality risk was very low, caused him and his group members, Drs. Kowey and Freeling, to stop referring patients to Dr. Spagna. The physician who had referred his patient to Dr. Marinchak, and who had been a loyal referrer of patients to him, was upset and angry. (Tr. 5/25/94, N.T. 8-9). He testified that Dr. Spagna conveyed to him an attitude of indifference and demonstrated sloppy care and management. (*Ibid.*).

Dr. Kowey, who was director of the MCP cardiac rhythm service and full professor of medicine, testified that the surgical results from the Spagna/Gomez group were poor in terms of inordinately high mortality and surgical complications, such as infection and bleeding wounds in the leg and chest areas, in relatively routine surgical procedures that should have gone smoothly. (Tr. 5/25/94, N.T. 15-16). He testified that part of his group's unhappiness was the fact that they thought their patients were getting poor post-operative care and that Dr. Gomez was part and parcel of the problem. (*Id.* 17). Dr. Kowey testified that, despite his specific written orders and chart note as to the post-operative management of his patient who had a rhythmic abnormality and had undergone

open heart surgery, Dr. Gomez did the opposite of what he had directed. The patient's cardiac rhythmic abnormality became ten times worse than what the patient had originally. (*Ibid.*). He said that he confronted Dr. Gomez about the matter and told him that he never wanted that to happen again. Nevertheless, he said, Dr. Gomez did the same thing a second time. This, Dr. Kowey said, triggered his going to Dr. Meister and telling him "that was it" and that he was not going to refer their patients any longer to the Spagna/Gomez group. (*Id.* 19). Dr. Kowey explained his non-referral decision thusly:

> I wasn't going to refer my patients, our patients, who we were really entrusted with – you have to remember this is a referral system, patients are sent to us and they're – and we are supposed to take care of them, it's our responsibility to take care of these patients from other doctors. And I simply was not going to take these patients' lives and place them in jeopardy simply because they were the full-time surgeons at MCP when I had other alternatives. I mean, why slam my head into the wall and go in loggerheads with somebody when I have every right as a physician to take the patient and send him to another doctor, and that's exactly what I did.

Dr. Wolf, director of the MCP cardiac catherization laboratory, testified that he also initially referred cases to the Spagna/Gomez group and did not specify who should be primary surgeon and who should assist. (Tr. 5/18/94, N.T. 127). Eventually, he said, he did specify that he did not want Dr. Gomez taking care of his patients. (*Id.* 128). As reasons, he cited three events. The first was an occasion in which, in his opinion, Dr. Gomez

acted improperly in responding to and supervising a cardiac arrest situation in the surgical intensive care unit following open heart surgery of a patient of Dr. Gomez's. Dr. Wolf said that he observed Dr. Gomez yelling at, and blaming, nurses and house officers and, in his opinion, this behavior was abysmal. (*Id.* 129). The second was an uninformed accusation by Dr. Gomez, communicated to family members of the patient, that Dr. Wolf had caused a stroke in Dr. Wolf's patient, on whom Dr. Gomez had operated. (*Id.* 129-130; 133-134). Dr. Wolf testified that Dr. Gomez made this accusation to the patient's family without ever consulting him or determining what kind of carotid massage, supposedly the cause of the stroke, was performed. (*Id.* 129-30). It was unrebutted that the left side carotid sinus artery massage done by Dr. Wolf could not have caused the left side stroke because the motor nerves cross over in the brain. (5/24/94, N.T. 67) (*Id.*). Any possible harm would have occurred on the right side, not the left. Dr. Wolf was upset that Dr. Gomez, in making the wrong diagnosis and erroneous statements to the family, had set him up for a lawsuit.

The third event was a strongly-worded patient complaint to Dr. Wolf against Dr. Gomez regarding the latter's behavior. Dr. Wolf testified that a patient was so upset that he threatened to put a contract out on his life if he let Dr. Gomez back into the patient's room. (*Id.* 134). Dr. Wolf said he related these events to Dr. Spagna. (*Ibid.*). He also discussed these incidents with Dr. Meister, who was obligated to transmit these complaints to Dr. Spagna and Dr. Kaye, chair of the department of medicine, and to Dr. Ross, dean of MCP. (Tr. 5/18/94, N.T.

64-67). Dr. Meister and Dr. Wolf advised Dr. Spagna separately that, based upon these events and others described in Plaintiff's Exhibit 20, they did not want Dr. Gomez involved with their patients, at least while the patients were conscious. (*Id.* 68-69). At that point, Drs. Meister and Wolf were still willing to have Dr. Gomez operate on their referrals and to attend to them in the recovery room. Subsequently, they determined from the mortality and morbidity statistics, which were being kept on their patients, that the risks were too high to warrant continued referrals to the Spagna/Gomez group. (*Id.* 59).

On February 12, 1989 Dr. Steven Peitzman, professor of medicine and member of the MCP kidney team, also complained by letter to Dr. Sigel, then the chair of the surgery department, that Dr. Gomez had misdiagnosed the condition of cardiac tamponade in his patient and had treated him (Dr. Peitzman) in a most condescending, arrogant and unprofessional manner. Copies were sent to Drs. Meister and Spagna. (*Id.* 55-59).

Because of the undisputed complaints of cardiologists regarding lack of cooperative communication in the operative and/or post-operative patient management, no jury could rationally find that discrimination played the causal role in the non-renewal of Gomez's contract, which is inextricably tied to the non-referrals to the Spagna/Gomez group.

No evidence was offered by plaintiff to show that the medical events cited by the cardiologists did not occur. Moreover, no medical opinion was adduced to show that the reasons advanced by the cardiologists for their decisions to stop referring patients to the Spagna/Gomez

team or to Dr. Gomez in particular were so contrary to established medical knowledge, physician/patient responsibilities or medical community standards as to be suspect of national origin/race animus directed at persons from the country of Colombia. Consequently, the cardiologists' testimony must be taken as true. No rational jury could have concluded that the cardiologists, who had factual bases for exercising their professional medical judgment, did not do so in good faith, or that they acted under pretext in refusing to continue submitting their patients to the care of Drs. Spagna and Gomez.

4. Dr. Gomez's claims of pretext

The plaintiff failed to present any evidence to show that his dismissal was grounded in an unlawfully discriminatory animus. While Dr. Gomez argued that Dr. Meister must have unlawfully influenced the other cardiologists not to refer cases to him and Dr. Spagna, there is no evidence to support this contention. In fact, the evidence is to the contrary. Further, because there is no evidence that the cardiologists fabricated the statistics or medical events giving rise to the exercise of independent medical judgment, issues of animus are irrelevant.

As accounted above, Dr. Gomez failed to present any evidence that Dr. Meister had any influence over MCP's hiring decisions or on the cardiologists' referrals. Rather, the evidence shows that the cardiologists had their own, legitmiate [sic] reasons for not referring cases to the Spagna/Gomez team. In fact, the only possible evidence of national origin discrimination as to Dr. Gomez is found in the letter of July 21, 1988. There, Dr. Meister expressed

his preference for Dr. Haji Sharif, a native of either Pakistan or India, because he had demonstrated his excellence to the MCP cardiologists and looked "American" whereas he thought Dr. Gomez looked and talked like a "foreigner" and was to him, at least, an unknown commodity.

Plaintiff presented no evidence that could establish any causal link between Dr. Meister's letter and MCP's decision not to continue to employ him. As already established, plaintiff is unable to show that Dr. Meister had any say in MCP's hiring practices; even if he did, Dr. Gomez was hired despite any anti-foreign animus Dr. Meister may have had. The letter made it clear that Dr. Meister recognized that the primary decision was not his but Dr. Spagna's, to whose judgment he deferred. Further, he stated that while he disagreed with Dr. Spagna's choice of Dr. Gomez, he would support that choice. There is no evidence that he did not. Nor is there evidence that Dr. Meister influenced cardiologists in their referral decisions. Dr. Meister testified that he referred patients for whom he had referral discretion to the cardiothoracic division and left it to Dr. Spagna to determine who would be primary surgeon. (Tr. 5/18/94). In fact, Dr. Furey testified that Dr. Meister specifically asked him to use the full-time surgeons when he first joined the staff at MCP. (Tr. 5/24/94, N.T. 144). In addition, Dr. Meister testified that after several cardiologists expressed concern over the full-time surgical results, he encouraged them to continue referring patients to the Spagna/Gomez team until more statistics were gathered. (Tr. 5/18/94, N.T. 73). Finally,

there is no evidence that, when Dr. Meister stopped referring patients, he did not treat Dr. Spagna and Dr. Gomez alike.

Because plaintiff cannot show any causal link between Dr. Meister's letter and the decision to hire and later terminate Gomez, the comments in the letter cannot be used as evidence of anti-foreign animus on the part of MCP. Courts have repeated[ly] stressed that such "stray remarks" have no probative value regarding discrimination where they are not related to the decision being challenged, were not made by the decision-maker, and were made "temporally remote from the date of the decision." *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 88 (1993) (citing *Price Waterhouse v. Hopkins*, 409 U.S. 228, 277 (1989) (O'Connor, J., concurring)). No evidence was presented that could show that this letter influenced the decision not to renew Gomez's contract, nor, indeed, that any of the members of the MCP Board of Directors even saw the letter. Thus, the letter is not probative of any discriminatory action by MCP and cannot be used by a jury as a basis for inferring such action.

Finally, while Dr. Gomez alleges that Dr. Whitman, who is not a member of a protected class, was hired to replace him, he presented no evidence to support this contention. In fact, the testimony by Mr. Zaren showed that Dr. Whitman was recruited to replace Dr. Spagna as "flagship" surgeon and to build a new cardiothoracic surgical division at MCP. (Tr. 5/24/94, N.T. 42-44). Dr. Gomez presented no evidence either that he was passed over for the new position as division chief in favor of Dr. Whitman, or that he was qualified for it.

CONCLUSION

Dr. Gomez failed to present any evidence to rebut the cardiologists' legitimate reasons for refusing to refer cases to the Spagna/Gomez group or to show that discrimination played *any* role in MCP's decision not to renew his contract. His suspicions about discrimination do not substitute for evidence. No evidence was adduced that Dr. Meister played any role in MCP's hiring and firing decisions. There is no evidence that Dr. Meister asked or influenced any cardiologist not to refer patients to Dr. Gomez for surgery. There is no evidence that Dr. Meister initially refused to refer surgical cases to Dr. Gomez. There is no evidence to rebut defendant's evidence that the cardiologists' decisions to stop referring their patients for surgery to both Dr. Spagna and Dr. Gomez were, by each, an exercise of independent professional judgement, made in the best interests of their particular patients. Because plaintiff failed to rebut any of MCP's evidence of legitimate reasons for their decision not to continue to employ Dr. Gomez, this evidence must be accepted as true. Thus, no rational jury could have found that MCP was motivated by anti-foreign/race animus toward the plaintiff. Accordingly, the judgment for the plaintiff is VACATED and judgment is entered for defendant and against plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERNANDO GOMEZ	:	CIVIL ACTION
v.	:	
MEDICAL COLLEGE OF PENNSYLVANIA	:	NO. 92-5048

ORDER

(Filed Aug. 12, 1994)

AND NOW, this 12th day of August, 1994, upon consideration of defendant's Motion for Judgment as a Matter of Law or for a New Trial, it is hereby ORDERED that:

1. Defendant's motion for judgment as a matter of law is GRANTED. Judgment for plaintiff is VACATED and judgment is entered for defendant and against plaintiff.

2. Defendant's motion for a new trial is DENIED as moot.

3. Defendant's motion for reduction of damages or for a new trial on damages is DENIED as moot.

BY THE COURT:

/s/ James T. Giles
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERNANDO GOMEZ	:	CIVIL ACTION
v.	:	
MEDICAL COLLEGE OF PENNSYLVANIA	:	NO. 92-5048

ORDER

(Filed Aug. 12, 1994)

AND NOW, this 12th day of August, 1994, upon consideration of Plaintiff's motion to add Allegheny Health Education and Research Foundation as a defendant and leave to amend the second amended civil action, it is hereby ORDERED that the motion is DENIED as moot in view of the Order entered this date granting defendant's motion for judgment as a matter of law.

Even if the defendant's motion had not been granted, the court would exercise its discretion not to allow the proposed amendment. Although Rule 15 of the Federal Rules of Civil Procedure states that amendments should be granted freely, the Supreme Court has held that the court may use its discretion to deny an amendment. The court must justify its denial. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Valid justifications for denial include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment." *Id.* In this case, the motion to amend is futile. Gomez has not stated a valid reason for

joining Allegheny Health Education and Research Foundation to this action. The only practical reason for joining Allegheny Health Education and Research Foundation at this time would be to protect Fernando Gomez from Medical College of Pennsylvania's inability to pay the damages awarded. Plaintiff has not provided the court with any proof of the defendants' inability to pay the damages awarded.

BY THE COURT:

/s/ James T. Giles
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERNANDO GOMEZ	:	CIVIL ACTION
v.	:	
MEDICAL COLLEGE OF PENNSYLVANIA	:	NO. 92-5048

ORDER

(Filed May 31, 1994)

AND NOW, this 31st day of May, 1994, in accordance with the jury's answers to Special Interrogatories on May 26, 1994, it is hereby ORDERED that judgment is molded and entered in favor of plaintiff and against defendant MCP in the amount of $2,484,000 on the claims asserted under Title VII, PHRA and contract.

BY THE COURT:

/s/ James T. Giles
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERNANDO GOMEZ, M.D.	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 92-CV-5048
v.	:	
MEDICAL COLLEGE OF PENNSYLVANIA	:	
	:	
Defendant.	:	

ORDER

(Filed May 27, 1994)

AND NOW, to wit, this 26th day of May, 1994, upon consideration of Defendant's Motion to Strike Plaintiff's Claim for Punitive Damages Under the Pennsylvania Human Relations Act, and plaintiff's response thereto, it is hereby ORDERED that:

1. Defendant's Motion is GRANTED.

2. Plaintiff's claim for punitive damages under the Pennsylvania Human Relations Act is stricken.

BY THE COURT:

/s/ James T. Giles
J.

DATED: _____

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1642

In The

Supreme Court of the United States

October Term, 1995

FERNANDO GOMEZ, M.D.,

Petitioner,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER; BERNARD SIGEL, M.D.; HOWARD ZAREN, M.D.; PASCHAL M. SPAGNA, M.D.; STEVEN G. MEISTER, M.D.; GLEN WHITMAN, M.D.; LESLIE A. MILLER, ESQUIRE,

Respondents.

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The petitioner is Fernando Gomez, M.D. The respondents are correctly listed in the caption, except that it is *The* Medical College of Pennsylvania. In addition, as noted in the Brief at 2 n. 1, all of the parties except The Medical College of Pennsylvania were dismissed prior to trial. Allegheny Health, Education and Research Foundation is the parent corporation of The Medical College of Pennsylvania.

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U.S. CONST. amend. V 1

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Third Circuit's opinion is reported at 71 F.3d 1079. (For the convenience of the Court, all citations to the opinion will be to the opinion appended to the petition.)

COUNTER-STATEMENT OF JURISDICTION

Respondents agree that petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Respondents disagree that this Court can properly exercise jurisdiction over those issues not presented to the court below. *See* discussion *supra* at 7 and 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Although petitioner accurately quotes the language of U.S. CONST. amend. V, respondents do not agree that it is relevant to this case.

In addition, 28 U.S.C. § 46, Assignment of judges; panels; hearings; quorum, is relevant to the review of the petition. Section 46 provides that:

* * *

> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court . . . .

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . .

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

COUNTER-STATEMENT OF THE CASE

Petitioner filed this lawsuit on August 31, 1991 following the non-renewal of his employment contract with The Medical College of Pennsylvania ("MCP" or "the Hospital"). Disappointed with not being able to finish his career as a cardiothoracic surgeon and teacher at MCP, and having no promise of tenure on which to sue, petitioner charged that MCP discontinued his employment because he is a Colombian native.[1]

At trial, petitioner did not (and could not) argue that MCP's stated reason for not renewing Dr. Gomez's employment contract -- *i.e.*, economic difficulties with the Department of Surgery -- was false, because there was simply no evidence that MCP's decisionmakers acted with any discriminatory animus. Instead, petitioner ignored the "national original blind" nature of the actual decision and asserted that the decision not to renew his contract was due to the underlying discriminatory

[1] Petitioner brought suit in federal court against MCP, as well as other individual and institutional defendants all of whom were dismissed prior to trial, invoking the district court's federal question jurisdiction under 28 U.S.C. § 1331.

animus in the cardiologists' failure to refer cases. This, in turn, petitioner argued, prevented him from generating sufficient revenue to support himself, which caused his contract not to be renewed. On appeal, petitioner further refined his argument by asserting that it was Dr. Steven Meister, Chief of Cardiology, alone, who discriminatorily refused to refer cases to him, which caused his contract not to be renewed. As determined by the district court and the Third Circuit, the evidence necessary to sustain these arguments does not exist in the record.

As the petition is replete with misstatements of fact, the respondents respectfully direct the Court's attention to the Third Circuit's opinion for an accurate statement of the facts.

In his statement of the case, petitioner, without any support in the record, states that Dr. Meister was the "main referrer" of cardiac patients for surgery, Pet. at 3.[2] There was no testimony to this effect nor evidence that the majority of referrals were controlled by Dr. Meister. Petitioner also offered no evidence that, if he had obtained referrals from all of the rest of the cardiologists, he would not have been able to support himself financially without referrals from Dr. Meister.

In addition to mischaracterizing Dr. Zaren's testimony, petitioner incorrectly states that Dr. Meister never

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[2] Petitioner's statement of the case also makes reference to the content of the recommendation letter of Dr. Gerald Lemole. Pet. at 3. This, like the other letters of recommendation offered by petitioner at trial, were not admitted for their content, but solely for the purpose of showing that Dr. Gomez had been recommended for the position. App. at 441a-443a.

referred patients to petitioner. Pet. at 4. The uncontradicted evidence, however, is to the contrary.

The practice among the cardiologists, including Dr. Meister, was to refer a case to a team or group, making individual referrals only where the referring doctor or patient requested it or there was some special procedure involved with which a particular surgeon was especially adept. App. at 345a, 355a-356a, 416a-417a.[3] In the case of petitioner, the full-time cardiologists never made referrals specifically to him, because, according to the cardiologists, no patient or referring doctor ever requested him. App. at 345a, 416a, 552a, 560a-561a. Some of the cardiologists did not even know that petitioner performed as a primary surgeon. App. at 548a, 551a, 573a-575a. All of the cardiologists, however, made referrals to MCP's full-time cardiothoracic surgery group (the Spagna/Gomez team), which Dr. Spagna, as Chief, may have ultimately assigned to petitioner to be the primary surgeon. Indeed, in the interest of building a strong heart program, it was considered preferable to refer cases to the full-time, in-house team. App. at 354a-355a.

Eventually, however, as noted in the Third Circuit's opinion, each of these cardiologists independently made the decision to stop referring cases to the Spagna/Gomez team.[4] App. at 423a-426a, 545a-547a, 561a-562a, 576a-577a, 584a-588a. The cardiologists complained that

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[3] All references to the record are to the appellate appendix.

[4] In the early 1980's, similar problems had occurred with full-time cardiothoracic surgical team that also led the cardiologists to stop referring cases to the full-time team. App. at 384a-385a.

they were losing patients who should have lived and were seeing more complications and readmissions than normal.[5] *E.g.*, App. at 561a-563a. The suspicion that something was wrong led Dr. Meister to collect data on the surgical results of the Spagna/Gomez team. App. at 394a. The data confirmed a higher mortality and morbidity rate with the Spagna/Gomez team. *Id.*

Not only were the surgical outcomes bad, but the cardiologists testified that their patients were no longer being managed in the manner their patients deserved, let alone that the cardiologists had come to expect. *E.g.*, App. at 563a, 586a-588a. Although the interactions between the cardiologists and the full-time surgeons had traditionally been very good, this was not the case with the Spagna/Gomez team. In particular, there were the numerous incidents involving Dr. Gomez described in the Third Circuit's opinion. Pet. App. 6-7. The cardiologists thought that these conflicts were directly contributing to their patients' poor outcomes. *E.g.*, App. at 586a-588a. As a result of the poor surgical results and the problems with post-operative treatment, there simply came a point when each of the cardiologists, exercising his independent professional medical judgment as a physician acting in the best interests of his patients, could no longer in good conscience continue to refer patients to the Spagna/Gomez team. App. at 384a, 423a-426a, 545a-548a, 561a-562a, 564a, 574a-578a, 584a-588a.

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[5] This is what is referred to as mortality and morbidity.

REASONS FOR DENYING THE WRIT

Petitioner, in a final, desperate attempt to hold on to an unfounded multi-million dollar jury verdict, misstates the facts and the law and misinterprets the Third Circuit's opinion in a failed effort to create an issue to justify this Court's granting certiorari. Although petitioner complains of conflicts in the law of the circuits and the denial of his constitutional rights, his real complaint is that the Third Circuit made erroneous factual findings and misapplied the law. In either case, the arguments are unsupported and do not otherwise justify this Court's review of the Third Circuit's decision.

I. THE THIRD CIRCUIT PROPERLY CONCLUDED THAT THE RECORD LACKED THE MINIMUM QUANTUM OF EVIDENCE FROM WHICH A JURY MIGHT REASONABLY CONCLUDE THAT DISCRIMINATION WAS A DETERMINATIVE FACTOR IN THE EMPLOYMENT DECISION.

The Third Circuit, after reading the briefs of and hearing oral argument from the parties, and carefully reviewing the record, reached the conclusion that the judgment as a matter of law must be sustained because the record was critically deficient of the minimum quantity of evidence needed to defeat a motion for judgment as a matter of law. Pet. App. at 17. According to the court, the record only established "good faith differences between plaintiff and other members of the staff over the proper treatment of patients at the hospital as well as personality conflicts unrelated to invidious discrimination." *Id.*

A. The Third Circuit Applied the Appropriate Standard of Review of an Entry of Judgment as a Matter of Law.

In reviewing the district court's grant of judgment as a matter of law, the Third Circuit applied the same standard as the district court. *Compare* Pet. App. at 11 *with* Pet. App. at 27. And, the district court clearly considered the testimony of the cardiologists. Pet. App. at 31-44. Petitioner did not, however, assert in his appeal to the Third Circuit that the district court improperly considered the entire record. Accordingly, this issue has been waived and this Court is without jurisdiction to hear it.

In determining if the non-moving party has put forth sufficient evidence from which a reasonable jury could afford relief, the Third Circuit, like the majority of the circuits, considers all the evidence. *E.g., Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (quoting *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir. 1992));[6] *Bell v. May Dept. Stores, Co.*, 866 F.2d 452, 455 (D.C. Cir. 1989); *Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304, 1310 (11th Cir. 1990); *Klein v. Grynberg*, 44 F.3d 1497, 1503 (10th Cir.), *cert. denied*, ___

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[6] *Inventive Music Ltd. v. Cohen*, 617 F.2d 29 (3d Cir. 1980), is not inapposite. The court in *Inventive Music* was reviewing the trial court's grant of a directed verdict at the close of the plaintiff's case. Thus, the only evidence offered was the plaintiff's. *Id.* at 33. Furthermore, the recent decisions of the Third Circuit have consistently reviewed all of the evidence. *E.g., Parkway Garage*, 5 F.3d 685; *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1137 (3d Cir. 1991) (quoting *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979) (in banc)).

U.S. ___, 116 S. Ct. 58 (1995); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. ___ (1993) (evidence considered as a whole); *Lester v. Resolution Trust Corp.*, 994 F.2d 1247, 1253 (7th Cir. 1993); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1345 (6th Cir. 1992) (court must consider all the admissible evidence); *Barnett v. I.R.S.*, 988 F.2d 1449, 1453 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 546 (1993); *Martin v. Cavelier Hotel Corp.*, 48 F.3d 1343, 1350 (4th Cir. 1995); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 952 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)).

Although petitioner asserts that there is a conflict among the circuits, Pet. at 18, of the cases he relies on, only one, *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), clearly states that the court should disregard the evidence produced by the moving party and should consider only the evidence favoring the nonmoving party. But, the standard stated by the Eighth Circuit in *Dace* is not absolute. As noted by the Eighth Circuit in *McAnally v. Gildersleeve*, 16 F.3d 1493, 1496 (8th Cir. 1994), the *Dace* court "left open instances in which a reviewing court can consider the moving party's evidence," including where that evidence is uncontradicted and unimpeached.

Furthermore, while the fact that the Eighth Circuit's standard is not in accord with the Third Circuit or the majority of the other circuits may justify reviewing an Eighth Circuit decision, it does not justify reviewing the decision of the Third Circuit. And, this Court has already

declined to hear this issue. *Schwimmer v. Sony Corp.*, 459 U.S. 1007 (1982).[7]

Moreover, in the context of a discrimination case based on pretext, such as this one, it is illogical that the court would look only to the plaintiff's evidence. A court has to look at the defendant's evidence to determine if the plaintiff has put forth sufficient evidence from which a reasonable jury could conclude that "but for [discrimination] he would not have been discharged." *Billet v. CIGNA Corp.*, 940 F.2d 812, 815 (3d Cir. 1991). In other words, the question is whether the plaintiff offered sufficient evidence to rebut the employer's legitimate, nondiscriminatory reason for the challenged employment decision and from which a jury could reasonably conclude that discrimination was the real reason for his termination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The court must therefore consider the defendant's evidence, as the Eighth Circuit did in *Dace*, 722 F.2d at 378-79.

In the present case, this required the court to consider the testimony of the cardiologists who petitioner asserted failed to refer cases to him because he is Colombian. It was for petitioner to put forth sufficient evidence from which a reasonable jury could conclude that the reasons offered by the cardiologists for not referring cases

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[7] Although Justice White states in his dissent that there is a conflict among the circuits, *Schwimmer*, 459 U.S. at 1009, it appears that, since 1982, the circuits have moved toward a more unified position. This self-correcting movement further advocates against granting certiorari and towards allowing the circuits to resolve any remaining conflict on their own.

to the Spagna/Gomez team -- the exercise of their professional judgment -- was a pretext for discrimination, which petitioner failed to do.

B. The Third Circuit's Alleged Misapplication of the Standard for Judgment as a Matter of Law Does Not Warrant This Court's Review.

Petitioner's real complaint is not with the standard set forth by the Third Circuit, but its application of the standard to these facts. Petitioner therefore argues that, had the court correctly applied the standard, it would have made the findings necessary to support the jury's verdict. Pet. at 19-20.

As an initial matter, while the "findings" suggested by petitioner might support a prima facie case, they do *not* support the conclusion that MCP discriminated against petitioner because he is Colombian. As noted by the Third Circuit, once the case has been tried to a jury, the question of the prima facie case drops out and the sole question becomes "whether the plaintiff has established by a preponderance of all of the evidence that discrimination was a determinative factor in the employment decision." Pet. App. at 12. Thus, evidence of petitioner's national origin, qualifications,[8] and replacement by someone not within the protected class[9] are not relevant to whether petitioner established that but for discrimination he would have retained his position.

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[8] As noted above, *see infra* at 3 n.2, the content of the "glowing support letter," *see* Pet. at 23, could not be considered by the jury.

[9] Dr. Whitman was not hired to replace petitioner, *see* Pet. at 20, but to replace Dr. Spagna as chief. It was for that reason that

In addition, petitioner's suggested findings are not supported by the record. There was no evidence that Dr. Meister was "responsible for making patient referrals to petitioner," that he "harbored an acute national origin bias against petitioner," or that he had a practice of testing all new surgeons. There was nothing in the record that suggested any of the cardiologists *had* to refer cases to the full-time surgeons or that Dr. Meister's and the other cardiologists' problems with petitioner were based on anything other than poor surgical results and petitioner's post-operative treatment of the cardiologists' patients. And, the record only showed that, in the case of the proposed new Chief of Cardiothoracic Surgery, Dr. Whitman, that Dr. Meister "tested" his skills as a surgeon by referring numerous cases to him where the results continued to be positive. App. at 351a-352a.

Similarly, petitioner argues that the Third Circuit improperly determined the credibility of the cardiologists. The principal problem with petitioner's argument is that the evidence he offered was not conflicting with the cardiologists' testimony. Petitioner did not establish that the cardiologists were lying when the cardiologists testified about their nightmarish experiences with petitioner. In fact, if anything, petitioner's evidence corroborated the cardiologists' testimony by confirming that these events took place. Nor did petitioner offer evidence to suggest that the cardiologists did not believe they were acting in

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Dr. Whitman was "tested" by Dr. Meister. App. at 351a-352a. There was no evidence that Dr. Meister, as a matter of practice, "tested" all new surgeons. *See* Pet. at 20.

the best interests of their patients when they ceased making referrals to the Spagna/Gomez team. In other words, there was no basis for the jury not to believe the cardiologists.

Moreover, in asserting that the Third Circuit improperly credited the doctors' testimony, petitioner overstates the dictum upon which he relies.[10] The Third Circuit did not suggest that the evidence of medical institutions was to be accorded greater weight, Pet. App. at 16; it simply suggests that due deference should be given to the proper exercise of medical judgment, *see id.* In fact, the Third Circuit did not decide whether the cardiologists' conduct could even be imputed to the Hospital. Pet. App. at 13. In sum, there can be no fear that future courts will rely on this opinion for the proposition that the evidence of medical institutions in Title VII cases is to be afforded greater weight.

II. THE THIRD CIRCUIT APPLIED THE CORRECT STANDARD OF PROOF FOR NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII.

Contrary to petitioner's assertion, the Third Circuit did not require any greater proof of unlawful national

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[10] Petitioner's suggestion that the Third Circuit was somehow bound to accept the Equal Employment Opportunity Commission's ("EEOC") evaluation of the facts, Pet. at 16 n.10, is unfounded. This did not involve statutory interpretation, let alone the court's review of an EEOC decision invoking such an interpretation. The "fundamental principle" referred to by Petitioner, *id.*, is therefore inapplicable. *See, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

origin discrimination than that required by other courts. Courts have held that discrimination can be inferred by showing that an employer has based an employment decision on characteristics clearly related to the plaintiff's national origin.[11] Thus, circuit courts have held that an employer cannot lawfully base a decision on an employee's accent, unless it materially interferes with job performance, because "an accent and national origin are inextricably intertwined." *Odima v. Westin Tuscon Hotel Co.*, 991 F.2d 595 (9th Cir. 1993) (quoting *Fragante v. City and Cty. of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)). *Accord Carino v. University of*

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[11] *Johnson v. Fleet Mortgage Corp.*, 878 F. Supp. 71 (E.D. La. 1995); *Metoyer v. State of Kansas*, 874 F. Supp. 1198 (D. Kan. 1995); and *Yacoub v. McGovern*, 840 F. Supp. 947 (N.D.N.Y. 1993), also do not support petitioner's argument of a conflict. In *Johnson*, 878 F. Supp. at 75, and *Yacoub*, 840 F. Supp. at 954, the district courts held that plaintiffs had established a prima facie case of national origin discrimination by offering direct evidence that the challenged employment decisions were based on their national origin. For example, in *Johnson*, 878 F. Supp. at 75, the plaintiff offered statements made by the decisionmaker that the plaintiff was being terminated because of her looks and because there were "too many employees of the same skin complexion." In *Metoyer*, 874 F. Supp. at 1203, the court held that the plaintiff could establish that she belonged to a protected national origin, an essential element to her prima facie case, without exacting proof of membership.

It was not disputed, nor relevant on appeal, that petitioner had made out a prima facie case by showing he was Colombian and thus a member of a protected class. Also, it should be noted that the court in *Metoyer* stated that the defendant's knowledge of "the plaintiff's [specific] national origin is critical to establishing that she was terminated under circumstances giving rise to an inference of discrimination." *Id.*

Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); *Berke v. Ohio Dept. of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980). Thus, where plaintiffs establish that the employment decisions were based on their accents, unlawful discrimination may be inferred. *E.g., Carino*, 750 F.2d at 819; *Berke*, 628 F.2d at 981. The cases do not hold that a plaintiff need only show "general foreign characteristics."

There was, however, no evidence here that the non-renewal decision or the failure to refer cases to petitioner or the Spagna/Gomez team was based on petitioner's accent or some other characteristic "inextricably intertwined" with his being Colombian. Accordingly, the Third Circuit's decision is not in conflict with decisions of other circuits.

The burden of proof of discrimination is not diminished by the holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 64 U.S.L.W. 4243, 1996 U.S. LEXIS 2168 (April 1, 1996).[12] *O'Connor* merely held that a plaintiff can make out a prima facie case of age discrimination by establishing that he lost his job to a younger employee, even if that employee is within the protected class, *i.e.*, over 40. This does not mean that, once the defendant put forward evidence of a non-discriminatory reason for replacing the older employee, the plaintiff does not need

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[12] Petitioner's reliance on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in support of his argument that the Third Circuit improperly discounted discriminatory bias based on the favorable treatment of other members of the protected group is incomprehensible. Petitioner selectively quotes from a portion of this Court's opinion discussing sex stereotyping, something clearly not in issue here.

to establish that those reasons were false and that discrimination was the real reason.

By analogy, if this holding were to apply to national origin discrimination, which it is not clear it would, it suggests only that a plaintiff could make out a prima facie case of national origin discrimination if he establishes that he lost his position to someone who is not of his national origin, even if that person is not himself an American. As noted above, however, the issue here is not whether petitioner made out his prima facie case, but whether he satisfied his ultimate burden of demonstrating by a preponderance of the evidence both that MCP's legitimate, non-discriminating reasons for its actions were false *and* that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502.

Moreover, if petitioner is correct and a prima facie case of national origin discrimination could be established by a mere showing that one is foreign, then there would be no basis to infer discrimination if other foreigners were treated better.

III. THE CONCLUSIONS REACHED BY THE THIRD CIRCUIT THAT WERE NOT ESSENTIAL TO THEIR DECISION DO NOT WARRANT SUPREME COURT REVIEW.

Petitioner asserts that this Court should review the Third Circuit's decision based on the dicta contained in the decision. The court, after concluding that the letter of Dr. Meister did not support an inference of discrimination, noted that the letter and other comments of Dr. Meister more properly fall into the category of stray

remarks by non-decisionmakers.[13] Pet. App. at 16. In reaching this conclusion, the court also stated that the exception to the stray remarks doctrine for statements made by non-decisionmakers did not apply. *Id.* As these statements were not essential to the Third Circuit's holding, their resolution to the contrary would not affect the result in this case.

In any event, the Third Circuit's statement in dictum that Dr. Meister's comments do not support an inference of discrimination by MCP because he was not petitioner's supervisor is not in conflict with other decisions of the Third Circuit[14] or decisions of other circuits. Courts have held that the discriminatory comments or conduct of non-decisionmakers will support an inference of discrimination only if those comments or conduct were the basis of or cause for the otherwise innocent, adverse employment

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[13] Petitioner's assertion that Dr. Meister's letter was made "concerning an important aspect of employment decisionmaking: patient referrals," Pet. at 11, is preposterous. There is no reference in the letter to patient referrals. The letter expressed Dr. Meister's opinion about Dr. Gomez's qualifications for the position. There is also no evidence that Dr. Meister made a decision, at that time, not to refer patients to petitioner. Rather, the letter makes clear Dr. Meister's intent to support Dr. Spagna's choice of partner.

[14] Petitioner's reliance on *Abram's v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) and *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 639 (3d Cir. 1993), as conflicting Third Circuit authority is misplaced. Petitioner quotes from dictum in *Abrams*. In *Abrams*, the court held that the evidence supported a jury finding that the supervisor participated in the decisionmaking, which Dr. Meister didn't do. Similarly, *Josey* speaks to cases where the supervisor influenced the decisionmaking process, which, again, is not the case here.

decisions of the decisionmakers. *See, e.g., Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994).

Critical to this analysis, however, is that the non-decisionmaker is plaintiff's supervisor and that supervisor's discriminatory animus or disparate treatment influenced the decision. *E.g., Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) (supervisor's negative evaluation read by decisionmakers and considered in making termination decision); *Wilson v. Susquehanna Township Police Dep't*, 55 F.3d 126 (3d Cir. 1995) (decisionmaker used supervisor's discriminatory comments as explanation for his decision); *Shager*, 913 F.2d 398; *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990) (disparate treatment of plaintiff by supervisor led to termination decision); *Simpson v. Diversitech Gen., Inc.*, 945 F.2d 156 (6th Cir. 1991) (disparate treatment and negative evaluations by supervisor led to plaintiff's termination). Only if these critical requirements are met is it irrelevant that the non-decisionmaker did not "pull the trigger." *See Stacks*, 27 F.3d at 1323.

Petitioner has not disputed (nor could he) that Dr. Meister was not his supervisor. Accordingly, the Third Circuit's conclusion that the exception was inapplicable was in accordance with the prior holdings of the Third Circuit and other circuits.

IV. THE FACT THAT ONLY TWO MEMBERS OF THE PANEL PARTICIPATED IN DRAFTING THE OPINION AND CONSIDERATION OF THE PETITION FOR PANEL REHEARING DID NOT RESULT IN THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner, by failing to raise the issue in his petition for rehearing, waived his argument that his constitutional rights were violated because one of the panel judges died before the opinion was drafted and thus neither participated in the drafting of the opinion nor in the consideration of panel rehearing. In any event, petitioner's argument fails because the use of two judges is sanctioned by federal law and local rules.

There is no statutory right to have three circuit judges draft an opinion. There is not even a statutory right to have three circuit judges hear oral argument. *United States v. Mills*, 317 F.2d 764 (4th Cir. 1963). 28 U.S.C. § 46(b) only requires that three judges be assigned to a panel in the first instance. *Murray v. National Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994). That one of those judges later does not ultimately participate in the full appellate process does not affect an appellant's rights. *Id. Accord Mills*, 317 F.2d 764.

Rather, all that is needed to render a decision is a quorum. *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957). A quorum exists if there are a majority of the number of judges authorized to constitute a court or panel thereof. 28 U.S.C. § 46(d). A panel shall include *no more than* three judges. 28 U.S.C. § 46(c). In this case, the decision was reached by the full panel, Pet. App. at 1 n.*, and the

opinion was drafted by a quorum. Accordingly, the case was properly disposed. *See Allied Stevedoring*, 241 F.2d at 927.

In addition, the Third Circuit has made provision for the use of panels consisting of fewer than three judges. The Internal Operating Procedures of the Third Circuit provide that "[u]nless there is a judicial emergency, each panel includes at least two judges of this court." Internal Operating Procedures of the United States Court of Appeals for the Third Circuit at § 3.1. In this case, the panel consisted of the number of judges of the court required by local procedure and more than the number required in the case of an emergency.

Moreover, petitioner's argument misses a critical point -- there was total concurrence in the panel's decision to affirm the district court's decision. That Judge Hutchinson's participation may have resulted in the court's opinion expressing some other grounds for affirming the lower court's decision is inconsequential. And, because Judge Hutchinson agreed with the decision of the Court, there is no more reason to believe that he would have considered rehearing than would Judge Weis or Roth.

Furthermore, petitioner also sought rehearing in banc. Thus, all active Third Circuit judges had an opportunity to reconsider the decision, but declined. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit at § 9.5.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit should be denied. Petitioner has failed to present any special or important reasons for this Court's review.

Respectfully submitted,

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(3)

No. 95-1642

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FERNANDO GOMEZ, M.D.,

Petitioner,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER; BERNARD SIGEL, M.D.; HOWARD ZAREN, M.D.; PASCHAL M. SPAGNA, M.D.; STEVEN G. MEISTER, M.D.; GLEN WHITMAN, M.D.; LESLIE A. MILLER, ESQUIRE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

I. INTRODUCTION

On April 10, 1996, petitioner, Dr. Fernando Gomez, filed a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Third Circuit. The petition arises from the reversal of a unanimous jury verdict in favor of Dr. Gomez on his claim that he was discharged by the Medical College of Pennsylvania ("MCP") on the basis of his national origin.

On May 13, 1996, respondents filed a brief in opposition to the petition. With utter disregard for their duty of candor, and with the intent to deceive the Court, respondents have contended that petitioner contrived many of the facts set forth in the petition in an effort to bolster his chances for review. This is an outrageous, unethical attempt to dissuade the Court from granting the petition.

The primary purpose of this reply is to correct respondents' knowing misrepresentations of the record, and to request that counsel for respondents be sanctioned, pursuant to Rule 8, for "conduct unbecoming a member of the Bar of this Court."

II. RESPONDENTS KNOWINGLY MISREPRESENTED THE RECORD

A. Respondents' Contention That There Was No Evidence That Dr. Meister Was The Main Referrer Of Cardiac Patients For Surgery Is A Blatant Misrepresentation Of The Record.

In its verdict, the jury implicitly found that Dr. Steven Meister, Chief of MCP's Division of Cardiology,

was the "main referrer" of cardiac patients for surgery, that the success of petitioner's employment hinged upon Meister's decisions to refer, or to not refer, patients to him for surgery, that Dr. Meister harbored an acute national origin bias against petitioner, that he refused to refer any cases to Dr. Gomez from the very outset of petitioner's employment, and that MCP discharged Dr. Gomez because he "generated few, if any, new patient referrals to the Division of Cardiothoracic Surgery." Reply App. at 1-2.

In their opposition brief, respondents state:

> In his statement of the case, petitioner, *without any support in the record*, states that Dr. Meister was the "main referrer" of cardiac patients for surgery. *There was no testimony to this effect* nor evidence that the majority of referrals were controlled by Dr. Meister.

Opp. Brf. at 3 (internal citation omitted) (emphasis supplied). However, Dr. Howard Zaren, Chairman of MCP's Department of Surgery, testified that Meister was indeed the "main referrer."

> Q: And understanding that Dr. Gomez was not receiving referrals, which is your testimony, did you also understand that he was not receiving referrals specifically from Dr. Meister?
>
> A: Well, Dr. Meister was the chief of cardiology, the full-time chief of cardiology, and he would be the *main referrer. And if he wasn't getting them, that's who he wasn't getting them from.*

Reply App. at 4 (N.T. of May 24, 1994 at 37, testimony of Dr. Howard Zaren) (emphasis supplied). This testimony, which went to the very heart of petitioner's case and was unchallenged below, was accepted by the jury as true.

Although respondents state that the cardiologists made patient referrals to the "Spagna/Gomez team," Opp. Brf. at 4, the jury believed Dr. Zaren's testimony that referrals were made on an individual basis, Reply App. at 5-7 (N.T. of May 24, 1994 at 28-29, testimony of Dr. Howard Zaren), and that the staff cardiologists were not responsible for making referrals.

Contrary to respondents' claims, Dr. Zaren's testimony was clearly referenced in petitioner's submissions to the District Court, as well as to the Third Circuit. Respondents' intentional misrepresentation to the Court that this critical evidence did not exist is a gross violation of respondents' duty of candor to the Court and should be sanctioned.

B. Respondents' Contention That There Was No Evidence That Dr. Meister Was Responsible For Making Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record.

Next, respondents state:

> In addition, petitioner's suggested findings are not supported by the record. There was *no evidence* that Dr. Meister was 'responsible for making patient referrals to petitioner' . . .

Opp. Brf. at 11 (internal citation omitted) (emphasis supplied). However, as set forth in Part A *supra*, Dr. Meister

was the primary referrer, and "if [petitioner] wasn't getting [referrals], that's who he wasn't getting them from." Reply App. at 4. Thus, respondents' representation to the Court is directly contrary to what is perhaps the most important testimony adduced at trial.

C. Respondents' Contention That Dr. Meister Made Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record.

In their opposition brief, respondents state:

> In addition to mischaracterizing Dr. Zaren's testimony, petitioner incorrectly states that Dr. Meister never referred patients to petitioner. *The uncontradicted evidence, however, is to the contrary.*

Opp. Brf. at 3 (internal citation omitted) (emphasis supplied). However, Dr. Meister's own testimony belies respondents' assertion. On direct examination, Dr. Meister testified:

> Q: Sir, the question is, did you ever refer a case to Dr. Gomez individually?
>
> A: I don't think I ever did.

Reply App. at 7 (N.T. of May 18, 1994 at 46, testimony of Dr. Steven Meister). Additionally, Dr. Gomez himself testified that he received no referrals. Reply App. at 8-9 (N.T. of May 17, 1994 at 12, 16, testimony of Dr. Fernando Gomez). While petitioner's claim hinged upon Dr. Meister's refusal to refer patients to him due to Meister's national origin bias, a bias which MCP did nothing to

correct, respondents' counsel intentionally misrepresented to the Court that this critical testimony did not exist.

D. Respondents' Contention That the Cardiologists Were "Losing Patients Who Should Have Lived" Is A Blatant Misrepresentation Of The Record.

In their opposition brief, respondents state:

> The cardiologists complained that they were *losing patients who should have lived* . . .

Opp. Brf. at 4-5 (footnote omitted). This is a defamatory misrepresentation of the record. Although MCP paraded a host of cardiologists to the witness stand, there was no testimony, or documents introduced into evidence, showing that the cardiologists complained that they were *losing patients who should have lived*, and respondents' citation to the record provides absolutely no support for this outrageous claim. To the contrary, Dr. Gomez testified that the mortality rate for coronary bypasses was approximately 4.5, which he characterized as very good in light of the number of difficult cases. Reply App. at 10-11 (N.T. of May 25, 1994 at 23-24, testimony of Dr. Fernando Gomez). Respondents' unsupported claim that Dr. Gomez was responsible for "losing patients *who should have lived*" is an outrageous attempt to portray petitioner in a negative light.

E. Respondents' Contention That Petitioner's Letters Of Recommendation Were Not Admitted For Their Content And Could Not Be Considered By The Jury Is A Blatant Misrepresentation Of The Record.

Next, respondents intentionally misrepresented to the Court that the content of petitioner's favorable letters of recommendation "were not admitted for their content" and "could not be considered by the jury." Opp. Brf. at 3, n. 2 (arguing that letters admitted "*solely* for the purpose of showing that Dr. Gomez had been recommended for the position.") (emphasis supplied); *see also* p. 10, n. 8. To the contrary, these letters were admitted into evidence and submitted to the jury for their consideration to show what MCP relied upon in its decision to recruit petitioner to work there.

THE COURT: Well sir, these are letters of recommendation that counsel wishes to show you concerning Dr. Gomez, prior to his hire, which were sent to you by various persons. Did you consider these letters in making a decision to extend an offer or contract with [sic] Dr. Gomez?

DR. SIGEL: Yes, they were part of the consideration.

THE COURT: I'll permit [counsel for plaintiff] to offer these as to what was received and considered. As to whether it's true or not, they are not – they can't be offered for that purpose. But they

> are received as to what was considered to be letters of recommendation for Dr. Gomez.

Reply App. at 12 (N.T. of May 18, 1994 at 154, testimony of Dr. Bernard Sigel, former Chairman of Surgery).

These letters were extremely probative because they demonstrated that MCP officials had reason to know that claims of Dr. Gomez's poor performance were baseless, bolstering his proof of pretext. MCP's misrepresentation to this Court that this evidence was not even considered by the jury is a gross violation of respondents' duty of candor to the Court and should be sanctioned.

III. Respondents Misinterpret The Third Circuit's Local Rules Pertaining To The Use Of Two Judge Panels To Decide Appeals.

Respondents completely misinterpret the Internal Operating Procedures ("I.O.P.") of the Third Circuit. Although accurately quoting I.O.P. 3.1 ("[u]nless there is a judicial emergency, each panel includes at least two judges of *this* court") (emphasis supplied), respondents misunderstand this section to mean that appeals may be decided by two-judge panels. However, the I.O.P. must be read in the context of Title 28 of the United States Code:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, *each consisting of three judges, at least a majority of whom shall be judges of that [circuit] court*, unless such judges cannot sit because . . . there is an emergency . . .

28 U.S.C. § 46(b) (emphasis supplied). Therefore, the I.O.P. cited by respondents permits a panel to consist of less than a majority of judges *from within that circuit*. It does not relax the requirement that three judges must hear and decide an appeal.

IV. CONCLUSION

Each party bears a duty of candor toward the tribunal. In the context of a petition for a writ of certiorari, this duty is particularly important since the Court does not yet possess the relevant portions of the record. Here, as set forth above, respondents have intentionally misrepresented that petitioner contrived evidence in an unethical and illegitimate attempt to persuade the Court to ignore the jury's verdict and to deny the petition. Such a blatant violation of the duty of candor to the Court must not be tolerated and calls for the imposition of sanctions. At a minimum, respondents' misconduct substantially undermines the credibility of their challenge to the petition, which should be granted based upon the merits, and not denied in reliance upon these intentional misrepresentations.

For all of these reasons, as well as the reasons set forth in the petition, a writ of certiorari should be granted to review the Third Circuit's decision.

Respectfully submitted,

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July 17, 1990

Fernando R. Gomez, M.D.
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3300 Henry Avenue
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Dear Dr. Gomez:

I am writing in response to your recent undated letter stating your concerns occasioned by a letter dated June 27, 1990 from Leslie Ann Miller, Esquire, Secretary of the Board of Directors of The Medical College of Pennsylvania ("MCP"), reappointing you to the faculty for a final six-month term and advising that your appointment as an employed faculty member within the Department of Surgery (the "Department") will not be renewed beyond that term. Your letter was received in the Department on July 9, 1990.

Your letter contains a request, made pursuant to Article III, Section 9(c) of the Faculty Bylaws of MCP (the "Bylaws"), that you be furnished with written notice of the reasons why your faculty appointment will not be renewed. In my capacity as Interim Chairman of the Department, I will respond to that request. As you may recall from our recent conversation which took place in the presence of Dr. Paschal D. Spagna, I advised you that

the main reason involves the economic realities of operating the Department. Specifically, because you have generated few, if any, new patient referrals to the Division of Cardiothoracic Surgery, it is not economically feasible for the Department to continue to exhaust its limited resources to employ you

In your letter you also raise questions as to (1) whether Ms. Miller's June 27, 1990 letter constitutes adequate notice to you, within the meaning of Article III, Section 9(c) of the Bylaws, that your faculty appointment will not be renewed and (2) whether the six-month terminal reappointment period provided for in Ms. Miller's letter violates the provision of Article III, Section 9(a) of the Bylaws which states that nontenured faculty members are retained on a yearly contract.

I do not know the answers to those questions. However, in the interest of an amicable resolution of the issues presented in your recent undated letters to Ms. Miller and me relating to your terminal reappointment, I would be willing to consider recommending to the Dean of MCP that appropriate action be taken to extend your terminal reappointment period through June 30, 1991, the end of the current academic year. Your appointment as a member of the employed faculty within the Department would not be continued beyond that date.

Please advise me as to whether the foregoing discussion adequately addresses the concerns raised in your recent undated letters to Ms. Miller and me.

Very truly yours,

/s/ Howard A. Zaren
Howard A. Zaren, M.D., F.A.C.S.
Interim Chairman

HAZ:mej

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* * *

[p. 37] operated on, whether it be the full-time group or the volunteer group, correct?

A In essence I cared that we were a busy division of cardiothoracic surgery at the Medical College of Pennsylvania. I did care a bit more that it would be the full-time people that were the busiest because those dollars stayed in the department and stayed at the Medical College of Pennsylvania.

If the private physicians operated on patients, those finances went to the private physicians and did not come to the division of cardiothoracic surgery. But overall as you asked, Mr. Silverberg, I cared that the division be a busy division.

Q Whether it was Dr. Gomez operating a case or someone else, correct?

A Yes, correct.

Q And understanding that Dr. Gomez was not receiving referrals, which is your testimony, did you also understand that he was not receiving referrals specifically from Dr. Meister?

A Well, Dr. Meister was the chief of cardiology, the full-time chief of cardiology, and he would be the main referrer. And if he wasn't getting them, that's who he wasn't getting them from.

Q But you never confronted Dr. Meister and asked him why

* * *

[p. 28] there were several private groups of surgeons that practiced there that were not full-time.

Q But the question is, there were no such things as teams of surgeons to operate cardiac patients at MCP while you were there, correct?

A I'm not familiar with the team, what your team concept you are trying to say.

There were several groups of practicing surgeons at the Medical College of Pennsylvania during my period of being interim chairman.

THE COURT: How did the group operate?

THE WITNESS: How the other groups operate? The –

THE COURT: Well, how did the group of Spagna and Gomez procedurally operate?

THE WITNESS: They were –

THE COURT: I don't mean operate on patients –

THE WITNESS: Right.

THE COURT: – I mean how they take care of the business –

THE WITNESS: Yes.

THE COURT: – internally?

THE WITNESS: Yes, your Honor. They were full-time employees of the Medical College of Pennsylvania as opposed to the other private groups who were in

private practice, who practiced cardiothoracic surgery at the Medical College of [p. 29] Pennsylvania.

THE COURT: Counsel's question really is whether or not Dr. Gomez was independent from Dr. Spagna?

THE WITNESS: No, absolutely not. They were members of the same group.

BY MR. SILVERBERG:

Q Let me ask the question this way.

When a referral is made from the division of cardiology to the division of cardiothoracic surgery, the cardiologists selects the specific surgeon to do the work on the patient, correct?

A That is correct.

Q And the cardiologist refers the patient to the surgeon of the cardiologists choice, correct?

A That is correct.

Q Now, you had no difficulty understanding Dr. Gomez when he spoke to you, is that fair?

A Usually not.

Q Well, it's true that the only occasion that you had – strike the question.

That the only difficulty that you had in understanding Dr. Gomez was attributable to a small hearing defect of your own, correct?

A Yes. I have a small hearing defect, and when Dr. Gomez would become a little excited, it was some times difficult

* * *

Meister – Direct

[p. 46] spoken to him and he's agreeable.

That's the way you do it when you have a team. If I had someone who specifically requested Dr. DiCessa which happens sometimes, or Dr. Whitman which happens sometime, then I'll make that known. But it was customary with the Spagna-Gomez team that you referred to those people.

Q Sir, the question is, did you ever refer a case to Dr. Gomez individually?

A I don't think I ever did.

Q Thank you.

(Pause in proceedings.)

Q To take a quick step back.

At any time did you ever speak to any of the people at the Deborah that Dr. Gomez had worked with in your interviewing of him?

A No, I don't think so. That wouldn't have been appropriate.

Q When you referred cases – strike the question.

Dr. Whitman began his employment at MCP in August 1990, correct?

A That's right.

Q And you referred cases individually to Dr. Whitman because he was on trial, correct?

* * *

Gomez – Direct

[p. 12] I was thinking that I was doing a good job and I was very earnest about it, because I was giving my whole body and my whole spirit and my whole brain to try to put this work to be successful. I didn't know anything more.

Q Were you working with the full time cardiologists at MCP or the volunteer cardiologists – I'm sorry, strike the question.

Were you working with the full time cardiologists at MCP at that point?

A Yes, my contract say that I cannot work with any other body outside of the hospital, so for that reason I was working only with the people at Medical College of Pennsylvania.

Q At that six – at this six month juncture, what if referrals had Dr. Meister made to you for cardiac surgery?

A Zero.

Q Who is Dr. Nelson Wolfe?

THE COURT: Well, just a minute. How many, if you know, had he made to Dr. Spagna?

THE WITNESS: The rest of the cases, sir.

THE COURT: How many were they?

THE WITNESS: I don't have the statistics at the present moment with me, so for that reason I cannot be mathematical sure about this answer. But I am telling you that when I –

* * *

[p. 16] THE COURT: At what – at that time, what conversation did you have with him?

THE WITNESS: I told him that I noticed that there was a decrease of cases for the surgical – for the cardiothoracic member of the hospital and I told him that I did not have any referral from the cardiothoracic – from the cardiac department for myself.

THE COURT: Now are you saying, sir, that the number of referrals was going down?

THE WITNESS: Yes, sir.

THE COURT: And you still were not getting any referrals of the referrals that were being made?

THE WITNESS: Yes, sir.

THE COURT: Okay. Was any explanation at that time given to you by Dr. Spagna?

THE WITNESS: He told me that was an internal affair, that that was the way to work at the cardiology department at the Medical College of Pennsylvania and he cannot do anything.

And the reason why I talking with there, sir –

THE COURT: No, just a minute.

MR. SILVERBERG: Your Honor, as a preliminary matter, we would move Exhibit P-5 into admission.

THE COURT: It's admitted.

(Plaintiff's Exhibit 5 is admitted into evidence.)

* * *

[p. 23] BY MR. SILVERBERG:

Q There has been testimony about the mortality rate for the full-time surgeons at MCP, did you maintain statistics concerning the mortality rate for the full-time surgeons at MCP while you were there?

A Yes, sir, I did, that was my job all the time in the hospital before I started to work, because there was no statistic in that hospital, nobody knows what happened there. So, for that reason my job was to do the statistics and also was to do the . . . an insurance review, to make sure about the quality of the care of the patients. So, I knew all the complications and I report all the complications of each of the patients each month to the administration of the hospital and to Dr. Spagna, who was my chief.

Q Do you recall the morbidity and mortality statistics for the years that you worked at MCP?

A I am not completely sure about, but I recall that the mortality for coronary bypasses was around 4.5, 4.6.

Q And based on your experience as a cardiothoracic surgeon how would you characterize that mortality rate as – for example, as being high or low?

A I believe that was a good – good mortality, because there was around 166 or 170 cases and the mortality was seven cases. And we take a lot of complications for the cardiothoracic division of the Medical College of [p. 24] Pennsylvania, as I recall there was around 12 cases that we had to operate as emergency. These are very difficult cases, so for that reason the mortality that we have or Dr. Spagna has in the coronary artery bypass was not very high, was acceptable.

Q There has been testimony here about the application of carotid artery massage, what is – briefly, what is carotid artery massage?

A Carotid artery massage is a maneuver to try to produce a stimulation of the nerves who are around the carotid bifurcation. The reason for that maneuver is to decrease the heart rate.

Q Now, describe for the jury how one actually engages in carotid artery massage, how one does it?

A According with a book that is called the Manual of Cardiac Care from Massachusetts General Hospital the person who is going to do a carotid massage has to compress the bifurcation of the aorta against the vertebral bones. The compression had to be back and forth, up and down, and had to be a compression with a force strong enough to produce an indentation in a tennis ball, that's what the book say. That maneuver had to last only few seconds.

Q Was there an incident at the Medical College of Pennsylvania in which you had instructed that a patient not receive carotid artery massage?

* * *

[p. 154] MR. HUNSICKER: Object to the letters of reference to the extent they're being used for matters of the truth asserted in these letters on hearsay grounds.

THE COURT: Just a second, please.

(Pause in proceedings.)

THE COURT: Well sir, these are letters of recommendation that counsel wishes to show you concerning Dr. Gomez, prior to his hire, which were sent to you by various persons. Did you consider these letters in making a decision to extend an offer or contract with Dr. Gomez?

THE WITNESS: Yes, they were part of the consideration.

THE COURT: I'll permit you to offer these as what was received and considered. As to whether it's true or not, they are not – they can't be offered for that purpose. But they are received as to what was considered to be letters of recommendation for Dr. Gomez.

MR. SILVERBERG: Approach?

THE COURT: Yes. It's not –

MR. SILVERBERG: You can mark them collectively and just sit them up there.

THE COURT: Well they were letters of recommendation received from various people. They're admitted as the fact the letters were received from certain persons. You may ask the witness whether or not he assumed everything in there to

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